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REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF CALIFORNIA,
DURING JULY AND OCTOBER TERMS, 1857.

REPORTED BY H. TOLER BOORAEM,
COUNSELOR AT LAW.

Volume VIII.

SECOND EDITION.

WITH NOTES AND REFERENCES TO SUBSEQUENT DECISIONS,

By ROBERT DESTY,

ATTORNEY AT LAW.

SAN FRANCISCO:
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1875.

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PROCEEDINGS OF THE COURT

HAD UPON-~~THE~~

DEATH OF JUDGE MURRAY.

MONDAY, October 5, A. D. 1857.

Present—TERRY, C. J.; BURNETT, J.

On the opening of the Court, W. T. Wallace, Esq., Attorney-General of the State, arose and said:—

“ May it please your Honors:

“ Since your last adjournment it has pleased an all-wise Providence to remove from our midst the Hon. HUGH C. MURRAY, the late Chief Justice of the Supreme Court of California.

“ Arriving upon our shores a youth, unknown and unheralded, unaided by any of the fortuitous circumstances which sometimes lend success to men, he commenced his high career; but he was not even then unnoticed; one who heard his first effort here, as a lawyer, has often, in other years, related to me the deep interest which his eloquence threw around the first cause which he argued upon these shores.

“ After his arrival in this State, JUDGE MURRAY did not long remain at the bar. It was early discovered that he was fitted for a loftier position. He was first elected one of the Judges of the Superior Court of the city of San Francisco. In that position his great abilities as a jurist were so signally displayed, that in accordance with the general wish of the bar, at the earliest opportunity which offered, he was transferred to the bench of the Supreme Court, in which position, having been twice elected by the people of the State, he continued until death put a period to his usefulness. He was gifted by nature with an intellect capable of grasping the mightiest subjects; he had a mind which passed with ease through the meshes in which ingenuity or sophistry had interwoven a cause, to the controlling point; and he was possessed of an analysis, under the magic operation of which the most intricate legal problems were solved as if by intuition. At the early age of thirty-two years, it is not to be denied that his position was in the front rank of the jurists of our country. In view of so much accomplished while he was yet in the morning of life, who could tell what he might have effected for his country and himself when years and experience had fully matured his great powers? But he is

gone. Glassy and dim now is the eye that we have seen here so often lit up with the flash of genius and intelligence. That generous and kind heart is stilled forever. That noble form, which we have so long seen presiding over the judicial destinies of a great State, has passed away, and of the loved and honored and gifted departed, nothing is left but the bright page in the judicial history of the State which his genius adorned, and the memory of the *man*, most fondly cherished by those who knew him best. He had no negatives in his nature. He never shunned responsibility, and never turned aside in his pathway to avoid consequences; and, like all men of such strongly marked and positive character, he had bitter enemies and devoted friends: but friends and generous foes alike, gathering around his early tomb, pronounce his untimely death the greatest calamity that has as yet befallen the fortunes of our young commonwealth.

"I move your Honors that the resolutions of the Sacramento Bar, which I have the honor now to read and present, may be entered upon the minutes of the Court, and that this Court do now adjourn, as a mark of respect to the memory of the lamented deceased."

MEETING OF THE SACRAMENTO BAR.

SEPTEMBER 19th, 1857.

Pursuant to adjournment, the members of the bar assembled at eleven o'clock, in the Supreme Court room. The seat lately occupied by the deceased bore the marks of mourning.

L. Sanders, Jr., resumed the Chair, and H. T. Booraem again acted as Secretary.

The first business in order was the report of the committee, appointed at the previous meeting, on resolutions, expressive of the feelings of the bar.

Jos. W. Winans, chairman of the committee, submitted the following:

"Whereas, It has pleased the Supreme Ruler of the Universe, by an afflictive dispensation of His Providence, to summon from our midst the Hon. HUGH C. MURRAY, Chief Justice of the Supreme Court of the State of California.

"And Whereas, In the high station which he filled and honored for so many years—a station he had won through the force of his commanding talents, unaided by the advantage of patronage, the combination of circumstances, or the influence of power—his plastic hand shaped forth and framed, or mainly framed, for this new State, a system of judicial exposition, not surpassed for equity and soundness by that of any Government in which the common law prevails;

"And Whereas, That bright career of usefulness and glory, which smiled before him, has been suddenly arrested by the hand of the 'grim sergeant, Death,' at a period of great emer-

gency, when, in the fluctuations of affairs, his firmness, moderation, and judicial wisdom could but ill be spared: therefore,

“Resolved, That we deeply deplore the said event, not only as an individual bereavement, but as a great public and national calamity.

“Resolved, That in the illustrious deceased the Bench has lost one of its brightest ornaments, and the law one of its ablest expounders.

“Resolved, That in this early departure of one whose ripening gifts of intellect and knowledge gave promise of such full fruition in the time to come, the cause of learning and jurisprudence has sustained a heavy blow.

“Resolved, That the members of the bar do attend the funeral of the deceased, in a body, and wear the usual badge of mourning for the period of thirty days.

“Resolved, That a copy of these resolutions be presented to the bereaved mother and all the surviving relatives of the deceased.

“JOSEPH W. WINANS,
“CHAS. T. BOTTS,
“MILTON S. LATHAM,

JOHN HEARD,
ROBT. F. MORRISON,
PHILIP L. EDWARDS.”

On motion of Robert Robinson, the report was adopted, unanimously.

P. L. Edwards moved that the Supreme Court, the District Court, and the County Court be requested to have the foregoing resolutions spread upon their journals. Unanimously adopted.

L. SANDERS, Jr., Chairman.

H. TOLER BOORAEM, Secretary.

In response to the motion of the Attorney-General, Chief Justice TERRY said:—

“The death of the HON. HUGH C. MURRAY, who for five years past has occupied, with distinguished ability, the position of Chief Justice of this Court, has filled us with unfeigned regret.

“Called early in life to an important position in the Judiciary of a new State, he was eminently fitted for the discharge of the onerous and responsible duties of the past. His quick perception, sound judgment, and vigorous intellect, enabled him to master, with ease, the most difficult questions; and the possession of great moral courage prevented his being swayed or influenced, in the conscientious discharge of his official duties, by any considerations of policy or regard for personal popularity. He has left his mark in the history of our young State, whose judicial reports, bearing the impress of his genius, will remain a lasting monument to his memory.

“As a judge, he was just, impartial and fearless. As a man, he was remarkable for the possession of social qualities which won, in a peculiar degree, upon the confidence and affection of

his associates. He was frank, candid, and ingenuous, almost to a fault; generous, to prodigality; and firm and faithful in his friendship.

"We deplore his early death, as an irreparable loss to the State; and, cordially approving the resolutions you have just read, order that the proceedings of to-day be entered on the minutes of the Court, and, as a mark of respect for the memory of our late distinguished brother, order that the Court stand adjourned until Monday next."

CASES REPORTED.

Adams v. Oakland.....	510	Conner, Montrose v.....	344
Adams v. Woods.....	152	Contra Costa Co., Gilman v.....	52
Adams v. Woods.....	308	Cook, Kane v.....	449
Allen v. Breslau.....	552	Cook v. Klink.....	347
Anthony v. Dunlap.....	26	Crandall v. Woods.....	136
Ashbury v. Sanders.....	62	Cunningham v. Hopkins.....	33
Astin, Placer Co. v.....	303		
Atwood, Ginaca v.....	446	Dallas, Davidson v.....	227
Aylett v. Langdon.....	1	Daly, Feeny v.....	84
		Davidson v. Dallas.....	227
Bagley v. Eaton.....	159	Deidesheimer v. Brown.....	339
Barker, Horr v.....	603	Delaney, Hopkins v.....	85
Barker, Horr v.....	609	Demint, People v.....	423
Bear River and A. W. & M. Co. v. New York Co.....	327	Dewey v. Bowman.....	145
Belden v. Henriques.....	87	Dewey, Whippley v.....	36
Benham v. Williams.....	97	Dickson, Burritt v.....	113
Bensley, Payne v.....	260	Dixey v. Pollock.....	570
Berry, Bryan v.....	130	Dunlap, Anthony v.....	26
Boling, Palmer v.....	384	Dunn v. Boring.....	406
Boring, People ex rel Dunn v.....	406		
Boswell v. Laird.....	469	Eaton, Bagley v.....	159
Bourne, Chapin v.....	294	El Dorado, People v.....	58
Bours, Brewster v.....	501	Engler, Feillett v.....	76
Bowman, Dewey v.....	145	English, Vaughn v.....	39
Boynton, Vance v.....	554	Estate of Buchanan.....	507
Brady, Frank v.....	47	Evans, Lee v.....	424
Breslau, Allen v.....	552		
Brewster v. Bours.....	501	Feeny v. Daly.....	84
Brown, Deidesheimer v.....	339	Feillett v. Engler.....	76
Bryan v. Berry.....	130	Fisher v. White.....	418
Bryan v. Ramirez.....	461	Frank v. Brady.....	47
Buchanan, Estate of.....	507	Franklin v. Reiner.....	340
Burritt v. Dickson.....	113	Freelon, People ex rel Hitchcock v.....	517
Butler, People v.....	435		
		Garr, Goodwin v.....	615
California Steam Navigation Co. v. Wright.....	585	Garwood v. Simpson.....	101
Carney, Potter v.....	574	Gay, Haight v.....	297
Chamberlain, Macomber v.....	322	Gehr, People v.....	359
Chapin v. Bourne.....	294	Gilman, Contra Costa Co. v.....	52
Chapman, Tuolumne Water Co. v.....	392	Ginaca v. Atwood.....	446
Chipman v. Hibbard.....	268	Goodale v. Scannell.....	27
Chisholm, People v.....	29	Goodwin v. Garr.....	615
Clark, White v.....	512	Gordon v. Searing.....	49
Cody, Rogers v.....	324	Graves, Swain v.....	549
Cohen, People v.....	42	Gray v. Hawes.....	562
		Grewell, Henderson v.....	581

Haight v. Gay	297	Montrose v. Conner	344
Harwood v. Marye	580	Moore, People v.	90
Hardenbergh, Winans v.	291	Murray, People v.	519
Harris, Reynolds v.	617	Muygridge, Swift v.	445
Hawes, Gray v.	562		
Haworth, Webster v.	21	Nagle v. Homer	353
Hazlett, Swartz v.	118	Naglee v. Minturn	540
Henderson v. Grewell	581	Norton v. Hyatt	539
Hendrickson, Osborn v.	31		
Henriques, Belden v.	87	Oakland, Adams v.	510
Hermann, Porter v.	619	Osborn v. Hendrickson	31
Hibbard, Chipman v.	268		
Hill v. King	336	Palmer v. Boling	384
Hitchcock v. Freelon	517	Palmer v. Tripp's Adm'r	95
Homer, Nagle v.	353	Parke v. Kilham	77
Hopkins, Cunningham v.	33	Payne v. Bensley	260
Hopkins v. Delany	85	Payne, People v.	341
Horr v. Barker	603	People v. Boring	406
Horr v. Barker	609	People v. Butler	435
House v. Keiser	499	People v. Chisholm	29
Howe v. Scannell	325	People v. Cohen	42
Hurley, People v.	390	People v. Demint	423
Hyatt, Norton v.	539	People v. El Dorado	58
		People v. Freelon	517
Independent Ditch Co., Leigh Co. v.	323	People v. Gehr	359
		People v. Hurley	390
Jenkins v. Redding	598	People v. Langdon	1
Johnson, Rickett v.	34	People v. Marshall	51
		People v. Mc Calla	301
Kalkman, Seligman v.	207	People v. McDermott	288
Kane v. Cook	449	People v. Mc Makin	547
Keiser, House v.	499	People v. Moore	90
Kilham, Parke v.	77	People v. Murray	519
King, Hill v.	336	People v. Payne	341
Klink, Cook v.	347	People v. Quincy	89
Knox v. Woods	545	People v. Shea	538
Kohlman, Meyer v.	44	People v. Williams	97
Kraemer, Revalk v.	66	Phelan v. Smith	520
Kraemer v. Revalk	74	Pico, McFarland v.	626
		Pioche, Marziou v.	522
Laird, Boswell v.	469	Placer Co v. Astin	303
Langdon, People ex rel Aylett v.	1	Pollock, Dixey v.	570
Lassen v. Vance	271	Porter v. Hermann	619
Lee v. Evans	424	Potter v. Carney	574
Lee, Thompson v.	275	Potter v. Seale	217
Leigh Co. v. Independent Ditch Co.	323	Price v. Whitman	412
		Quincy, People v.	89
Macomber v. Chamberlain	322		
Manlove v. White	376	Ramirez, Bryan v.	461
Marshall, People v.	51	Redding, Jenkins v.	598
Marye, Harwood v.	580	Reiner, Fraklin v.	340
Marziou v. Pioche	522	Revalk v. Kraemer	66
McCalla, People v.	301	Revalk, Kraemer v.	74
McDermott, People v.	288	Revalk, Van Reynegan v.	75
McDevitt v. Sullivan	592	Reynolds v. Harris	617
McFarland v. Pico	626	Rickett v. Johnson	34
McGregor, Shaw v.	521	Rogers v. Cody	324
McIlhane, Turner v.	575		
McMakin, People v.	547	Sanders, Ashbury v.	62
Meyer v. Kohlman	44	Saunders, Still v.	281
Minturn, Naglee v.	540	Scannell, Goodale v.	27
Mitchell v. Steelman	363	Scannell, Howe v.	325
		Scannell, Stewart v.	80

Seale, Potter v.....	217	Vance v. Boynton.....	554
Searing, Gordon v.....	49	Vance, Lassen v.....	271
Sedgwick, Walker v.....	398	Van Reynegan v. Revalk	75
Seligman v. Kalkman.....	207	Vaughn v. English.....	39
Shaw v. McGregor.....	521	Visher v. Webster.....	109
Shea, People v.....	538		
Simpson, Garwood v.....	101	Walker v. Sedgwick	398
Smith, Phelan v.....	520	Webster v. Haworth.....	21
Stark, Whitney v.....	514	Webster, Visher v.....	109
Steelman, Mitchell v.....	363	Welch v. Sullivan.....	165
Stewart v. Scannell.....	80	Welch v. Sullivan.....	511
Still v. Saunders.....	281	Whiple v. Dewey.....	36
Sullivan, McDevitt v.....	592	White v. Clark.....	512
Sullivan, Welch v.....	165	White, Fisher v.....	418
Sullivan, Welch v.....	511	White, Manlove v.....	376
Sutter Co., Upham v.....	378	White v. Todds Val. Wat. Co. .	443
Swain v. Graves.....	549	Whitman, Price v.....	412
Swartz v. Hazlett.....	118	Whitney v. Stark.....	514
Swift v. Muygridge.....	445	Williams, People <i>ex rel</i> Benham v.	97
		Winans v. Hardenbergh.....	291
Thompson v. Lee.....	275	Woods, Adams v.....	152
Todds Val. Wat. Co. White v ..	443	Woods, Adams v.....	306
Tripp's Admr., Palmer v.....	95	Woods, Crandall v.....	136
Tuolumne Wat. Co. v. Chapman.	392	Woods, Knox v.....	545
Turner v. McIlhaney.....	575	Wright, Cal. Steam Nav. Co v...	585
Upham v. Sutter Co.....	378	York Co., B. R. & A. W. & M.....	
		Co. v.	327

JUSTICES OF THE SUPREME COURT

DURING THE YEAR 1857.

During January, April and July Terms:

*HON. HUGH C. MURRAY CHIEF JUSTICE.

†HON. SOL. HEYDENFELDT	}	ASSOCIATE JUSTICES.
HON. DAVID S. TERRY		
HON. PETER H. BURNETT.....		

During October Term

HON. DAVID S. TERRY CHIEF JUSTICE.

HON. PETER H. BURNETT.....	}	ASSOCIATE JUSTICES.
HON. STEPHEN J. FIELD		

WILLIAM T. WALLACE, Esq., ATTORNEY-GENERAL.

CHARLES S. FAIRFAX, Esq., CLERK.

* Died, September 18, 1857.

† Resigned, January 6, 1857.

JULY TERM, 1857.

REPORTS OF CASES
DETERMINED IN THE
SUPREME COURT,
JULY TERM, 1857.

PEOPLE Ex REL. AYLETT v. LANGDON.

OFFICE, POWER TO FILL VACANCY.—Power to fill vacancy, and power to fill office, are distinct and substantial in their nature.

IDEM.—ACT RELATING TO INSANE ASYLUM CONSTRUED.—The twelfth section of the Act concerning the insane asylum, was not designed to apply to the unexpired term of office, but to the unexpired term of the officer, and makes no provision for a vacancy created by the failure of the Legislature to elect on the expiration of the term of the incumbent.

IDEM.—POWER OF GOVERNOR TO FILL VACANCY.—Power of the Governor to fill such vacancy in the office, is not derived from the statute, but from article five, section eight, of the Constitution, and that the appointee of the Executive would only hold until an election by the next Legislature.

IDEM.—TERM OF OFFICE.—The term of the office of the resident-physician of the asylum never runs apart from the officer, and commences running only from the date of his election, the Act only fixing the duration of his term, but not the exact time of its commencement.

IDEM.—VACANCY.—The vacancy referred to in the Act, is a vacancy occurring by death, or otherwise, in the term of a particular officer, which the Governor has the right to fill for the remainder of his unexpired term.

IDEM.—POWER TO APPOINT, WHERE VESTED.—Power to appoint for the full term of the office is vested in the Legislature, and the Governor has no right to exercise it.

APPEAL from the District Court of the Fifth Judicial District,
County of San Joaquin.

1. Vacancy, constitutional and statutory distinction of the term, disapproved, *People v. Tilton*, 37 Cal. 617. Power of Governor restricted, cited *People v. Parker*, Id. 650.

2. Cited *People v. Whitman*, 10 Cal. 46.

3. Restriction of power of Governor, cited *People v. Tilton*, 37 Cal. 621; *State v. Johns*, 3 Or. 535, 538; *Weeks v. Gamble*, 18 Fla. 18.

This was an information in the nature of a *quo warranto* to try the title to the office of resident-physician of the insane asylum of California. The relator claims the office by an election by the Legislature on the 13th of March, 1857. The defendant claims title to the office by virtue of an appointment made by the Governor on the 29th of April, 1856, for the period of two years from the date of said appointment. The agreed statement shows that Robert K. Reid was elected by the Legislature on the 24th of March, 1854, and commissioned on the 27th of the same month as resident-physician of said asylum; that the session of the Legislature for the year 1856, adjourned on the 21st of April, 1856, without electing a successor to him, and that on the 29th of the same month, Samuel Langdon, the defendant, was appointed by the Governor.

Judgment was rendered in the Court below, against the defendant, Langdon, and in favor of relator, from which this appeal was had.

D. W. Perley, for Appellant.

This was an information in the nature of a *quo warranto*, to inquire by what warrant the defendant holds and exercises the office of resident-physician to the asylum for the insane of the State of California.

The defendant claims that he is rightfully in possession of said office under an appointment made by the Governor of the State, on the 29th of April, 1856, for the period of two years from the time of said appointment.

The relator claims that he is justly entitled to the same office under an election by the Legislature of California on the 13th day of March, 1857.

The case was submitted to the Court below, on an agreed statement of facts, and judgment was rendered, ousting the defendant, and declaring the relator entitled to the office, and from that judgment this appeal has been taken.

There has already been one contest before this Court, respecting the right to the office now in controversy. This was the case of *The People v. Robert K. Reid*, decided at the July Term, 1856, in which this defendant was relator.

The relator then claimed the office under the same appointment and commission from the Governor, under which he now claims it. The Court held that his title was valid, and judgment was rendered in his favor.

In order to arrive at a correct conclusion in this case, it is first necessary to ascertain precisely the points decided by the Court in the former case.

It appears from the agreed statement of facts, in both cases, that Reid was elected by the Legislature for the legal term, on the 24th day of March, 1854, and on the 27th of the same month he received a commission from the Governor, took the oath of office, and entered on the discharge of the duties thereof.

*The legal term of the office was two years; consequently the term expired on the 24th day of March, 1856. [3]

The Legislature adjourned for the session, on the 21st day of April, 1856, without making any election, and on the 29th of the same month, Dr. Langdon was appointed by the Governor, as aforesaid.

The following points, then, are expressly decided by this Court, in the former case:

1. That at the expiration of two years from the date of Dr. Reid's election, there was a vacancy in the office.

2. That the Governor had power to fill the vacancy by appointment.

3. That this power of the Governor was in no way affected or impaired by the fact that the vacancy occurred during a session of the Legislature.

An adherence to the doctrines mentioned in the former case, is all that is required to enable the defendant to maintain his present title and right of possession to the office.

There was nothing expressly decided in the case against Reid with respect to the length of time Dr. Langdon was entitled to hold the office, under his appointment and commission as aforesaid.

That question is now distinctly presented by this case, and as far as the defendant's title is concerned, it is the only question in the case.

In discussing this question, the appellant will rely on the following propositions:

1. That after Reid's term of office had expired, the Governor had the power under the Constitution and laws, to fill the office, for the whole term.

2. That the Governor had the power to fill a vacancy in the office until the end of the term in existence, at the time the defendant was appointed; or, in other words, to fill a vacancy of any unexpired term.

3. That this term does not expire until the 24th day of March, A. D., 1858.

If the first proposition can be maintained, then Langdon is entitled to the office until the 29th day of April, 1858. If the last two can be maintained, then he is entitled to the office until March 24, 1858.

The office in controversy is not an office created by the Constitution, but it was created by the Act of May 17, 1853, Comp. Laws, 921, and referred to in the statement of facts.

By the sixth section of article eleven of the Constitution, it is provided as follows:

"All officers, whose election or appointment is not provided for by this constitution, and all officers whose offices may hereafter be created by law, shall be elected by the [4] people, or appointed, as the Legislature may direct."

This, then, is one of the offices referred to, and included in the above section of the Constitution.

The fifth section of the Act creating the office, provides as follows:

"The Legislature shall elect, on joint-ballot, one resident-physician, who shall be superintendent of the asylum. He shall hold his office for two years, and until his successor is appointed and qualified."

It is now contended, that this being an office created by law, the legislative power in filling it is limited to two modes by the sixth section of article eleven of the Constitution, above cited.

The first is an election by the people, the second is an appointment by the Executive of the State, or by the Governor and Senate.

It never was intended by the Constitution to allow the Legislature to create the office, and then to fill it by an election by themselves.

Such a proceeding is not only a violation of a salutary principle of free government, but it is in direct conflict with the third article of the Constitution, which provides as follows:

"The powers of the government shall be divided into three separate departments; the executive, the legislative, and the judicial, and no person charged with the exercise of powers belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases hereinafter expressly directed or permitted."

To create the office, prescribe the duration of the term, and to define the powers and duties of the officer, are clearly legislative functions, but to fill the office by an election in joint convention is not a legislative function. It is most clearly an invasion of the executive power of the State, or the rights of the people to elect.

By the third article, then, of the Constitution, the Legislature have no right to fill the office by election, and by section six of article eleven, they are required either to give the election to the people, or to give the appointment to the Executive.

By such an arrangement alone can the principle of the separation of powers, under the Constitution, be preserved.

The words "election" and "appointment" have a distinct and substantive meaning in the Constitution. They are not synonymous or convertible terms in that instrument. It is believed that no instance can be found in the Constitution itself, where these words are used indiscriminately.

If, however, this construction of those two articles of the Constitution is incorrect, and it should be held that the Legislature

may create the office, and afterwards fill it by election, it [5] is still *apparent from the fifth section of the Act, that they only intended to provide for the first election, and after the first legal term had expired, that they intended to give the appointment to the Governor.

The fair and plain meaning of the words of the act sustains this position.

If they had intended thereafter to fill the office by an elec-

tion, they would have said that the officer should hold his office for two years, and until his successor was elected and qualified; but they have not said this; they have said he should hold it until his successor was appointed and qualified.

The point is not only raised here, but is relied on with some confidence, and the Court is respectfully requested to decide upon the constitutional right and power of the Legislature to fill by election an office which they themselves have created. If they have not such power, this case is at an end, for the relator's title would be void, and the defendant being in possession would be entitled to judgment.

There can be no doubt, that if the Legislature, after creating the office, had provided that it should be filled every two years by appointment by the Governor, that this would have been perfectly constitutional under section 6, Article XI; and it is believed that this provision, taken in connection with the third article of the Constitution, and the language of the act creating the office, fully sustains the first proposition.

The second point mentioned by the appellant, is, that the Governor had power to fill the office, in case of a vacancy, for the unexpired term.

The legal term of the office is made two years by the fifth section of the act; but the act does not specify any particular day or time on which the term shall begin to run.

This point must be determined by, and depends on, the time when the first election took place under the act.

Not only the termination of the first term, but of all succeeding terms, must be governed and controlled by it as long as the present Act is in force. As the election of Reid was the first election under the Act, and as it occurred on the 24th of March, 1854, the first term commenced on that day, and expired on that day two years.

It appears to be almost too plain a proposition to require argument, that as soon as one term ends, another term commences to run. There can be no such thing as an *interim* or *interregnum*, between terms.

The Court decided in Reid's case, that at the expiration of two years from the date of his election, the office was *de jure*, vacant, although, *de facto*, he was still in office, and performing its functions.

Now, if there was a vacancy at that time in the office, there *must have been a vacancy either of a whole term [6] or an unexpired term, and if the Governor had power to fill that vacancy (which the Court has already decided,) he must have had power to fill it either for the whole term or for the unexpired term.

If there was a vacancy of the whole term, then the Court, in deciding the former case, that the Governor could fill it by appointment, have really, and in effect, though not in express words, decided this controversy; for the commission of Langdon runs until April 29, 1858.

If there was only a vacancy for part of a term, or of an unexpired term, which is the same thing, then express power and authority are given to the Governor by the twelfth section of the act, to fill such vacancy.

The words of this section are as follows:

“If any vacancy shall occur in the office of resident-physician, such vacancy shall be filled for the unexpired term, by appointment by the Governor.”

If the position assumed in this argument be correct, that as soon as one term ends another begins, then respondent held over into the second term for one month and five days, and consequently when Langdon was appointed, there was an unexpired term of one year and about eleven months, which would end on the 24th of March, 1858, whereas if he held for the two years from the date of his commission, his term would expire April 29, 1858.

When the Court considered the case of *The People v. Reid*, the twelfth section of the act above cited, was not brought to the notice of the Court at all. It was not considered material in that controversy, as nothing was involved except a present right of possession in Langdon, but the Court, in giving its opinion, appears to have founded the power of the Governor to fill the vacancy, on the eighth section of Article V. of the Constitution, which limits the power of the Governor to filling vacancies in office, and prescribes that he shall only fill until the end of the next session of the Legislature, or the next election by the people.

However correct the doctrine may be in respect to other offices in which no specific provision of law is made for filling the vacancy, it certainly does not, and cannot apply in this case.

The power of the Governor to fill the vacancy, in this office, does not depend on that article of the Constitution; the defendant's right to the office is in no way affected or controlled by that article; in fact, it has no influence or bearing on the case whatever, as can be most clearly shown.

The respondent's counsel in the Court below felt the infirmity of the case, provided any force or effect whatever was given to the twelfth section of the Act above cited. He contended that

[7] this section was in direct conflict with the eighth section of Article V of the Constitution; that it enlarged the power of the Governor, and was, therefore, void.

The appellant contends that the twelfth section of the Act is a legal, valid, and constitutional provision of law for filling a vacancy in this office, and he is willing to rest the entire controversy on this point. If this section of the Act cannot be successfully assailed, then, according to his own admissions, the respondent has no case, and the judgment must be reversed.

The question then is, is this section of the Act constitutional? I answer that it is clearly so under section six of article eleven of the Constitution above cited.

This being one of the offices created by law, it was fully admitted in the Court below, by respondent's counsel, that the Legislature could have provided that the Governor should always fill the office for the whole term by appointment, and that such a provision of law would have been perfectly constitutional, under section six of article eleven.

Is it not, then, the greatest inconsistency to maintain that the Governor might have power given him by the Act to fill the office for a whole term, but could not, by any possibility, have power to fill for a part of a term, or an unexpired term?

The greater power would clearly of itself include the less. How much stronger, then, does that power appear when directly sanctioned by the clear and express words of the very Act creating the office.

I repeat, then, that by the fifth section of the Act, the Governor has the power to fill for the whole term, after the first term had expired; and by the twelfth section of the Act, he has power to fill any vacancy that may happen during the existence of a term, until that term is fully ended; and that both of those sections are legal and constitutional, under the sixth section of article eleven of the Constitution.

I will now show that section eight of article five of the Constitution, does not apply to the case. The words of that section are as follows:

"When any office shall from any cause become vacant, and no mode is provided by the Constitution and laws for filling such vacancy, the Governor shall have power to fill such vacancy by granting a commission which shall expire at the end of the next session of the Legislature, or at the next election by the people."

Wherever the Constitution itself provides a mode of filling an office; that mode must be followed, and the Legislature cannot alter it; but where the Constitution is silent on the subject, but the law provides the mode of filling the office, that mode must be followed, except it be in conflict with some other provision of the Constitution.

This section only applies to vacancies in office where there is no mode provided by law for filling them. In this case, there is a mode provided, and that is appointment by the Governor for the unexpired term. [8]

The case of Mizner fully sustains the most important points contended for in this argument, particularly the total inapplicability of the eighth section of article five of the Constitution.

The Court say:

"Before the section can apply, two things must be shown—

"1. That a vacancy existed.

"2. That no mode of filling it was provided."

The entire case of the relator depends on showing that the power of the Governor to fill a vacancy in the office is limited, by the above section of the Constitution; but he has wholly failed in showing either fact, on which alone the section could apply.

It is, therefore, respectfully submitted to the Court that the judgment is erroneous, and ought to be reversed, and the Court below directed to enter judgment for the appellant.

Robinson. Beatty & Bots, for Respondent.

The facts of this case are few and simple. The Legislature in 1853, passed an Act for the establishment of an insane asylum at Stockton. The fifth section of the Act, (see p. 922 of the Compiled Laws,) provides for the office of resident-physician; fixes his salary, term of office, and mode of appointment. He is to be appointed by a vote of the Legislature on joint-ballot, and is to hold office for two years.

The Legislature of 1854 elected Dr. Reid to this office. The Legislature of 1856 failed to make an election. On the 29th day of April, 1856, after the adjournment of the Legislature, Governor Johnson commissioned Langdon as resident-physician for two years from date. On the 13th day of March, 1857, the Legislature, on joint-ballot, elected Aylett to the office. On the 30th day of April, the Legislature adjourned *sine die*.

The first question that these proceedings gave rise to, was as to the validity of Langdon's commission. It came to this Court under the title of "*People v. Reid*," decided at the July Term, 1856. The Court there held that the failure of the Legislature to elect, left the office vacant, and that the Governor might fill the vacancy, by virtue of the eighth section of the fifth article of the Constitution. Langdon was accordingly installed. The question now arises as to the term for which the appointment is to endure. The relator claims his office, first, from the date of his election; and, secondly, from the day of the adjournment of the Legislature. Langdon pretends that he is entitled to the office

for two years from the date of his commission, viz: from [9] the 29th day of April, 1856. The Judge of the *Fifth Judicial District, to whom the case was submitted by consent, rendered judgment in favor of Aylett, and from that judgment Langdon appeals to this Court.

The eighth section of the fifth article of the Constitution provides for the filling of vacancies in office, and is in these words:

"When any office shall from any cause become vacant, and no mode is provided by the Constitution and laws for filling such vacancy, the Governor shall have power to fill such vacancy by granting a commission, which shall expire at the next session of the Legislature, or at the next election by the people."

The construction of this clause has been the direct subject of judicial decision in five different cases in this Court. (*People v. Mott*, 2 Cal.; *People v. Fitch*, 1 Cal.; *People v. Wells*, 2 Cal. *People v. Reid*, Oct. Term, 1856; *People v. Mizner*, January Term, 1857.)

The principles deducible from these decisions, nay, directly

established by them, are, first, that when under this clause the Governor fills a vacancy, he fills it for a time defined by the Constitution, that is, until the meeting of the elective body; secondly, that the action of the elective body necessarily supersedes the power of the Governor to fill a vacancy; and, thirdly, that the spirit of the Constitution is opposed to the sole power of appointment in the Executive, and that it is not to be favored by construction or implication.

If it were admitted that Langdon's appointment was made by virtue of the eighth section of the fifth article of the Constitution, there could be no question that his term ended, either with the election made by the Legislature, or with the adjournment of that body.

But it is contended that he was not appointed under that section, but under and by virtue of the twelfth section of the Act creating the hospital. That section reads as follows:

"If any vacancy should occur in the office of resident-physician, such vacancy should be filled, for the unexpired term, by appointment of the Governor."

It is said that this is a case in which a mode of filling the vacancy is provided by law, and consequently it does not come within the eighth section of the fifth article.

Allowing the argument urged by the respondent, it must be borne in mind that the Constitution provides that the commission shall expire at the end of the next session of the Legislature, or the next election by the people. Here is a constitutional term: Yet the Act under consideration may extend to the appointment of the respondent beyond the time when the appointing power returns to the hands of the people by the Constitution, and thus deprive them of the right of electing their judges. (2 Cal. 205.)

Here is a clear recognition of the distinction between the *power of prescribing the mode of filling a vacancy [10] and the power of affecting the constitutional term for which the vacancy, however filled, is to endure. The commission, whether from the Governor or any other source the Legislature may prescribe, is to expire at the end of the next session of the Legislature, or at the next election by the people.

In this case, then, we contend that the object of the twelfth section of the Act is to provide only a mode of filling a vacancy in the office of resident-physician; the office itself to be filled, as provided in the fifth section, by a joint-vote of the two houses; that to permit the Governor, in filling a vacancy, to appoint for two years, would be to forget that the Constitution fixes the term for which an appointment to a vacancy may endure. It would be to extend the appointment to fill the vacancy "beyond the time when the appointing power returns to the hands of the Legislature."

In Fitch's case, it was held that the power to fill a vacancy arose only from the necessity of filling the gap or interregnum

between the occurrence creating the vacancy and the meeting of the elective body, and consequently it was an absurdity to suppose that it would exist during the sitting of the elective body; and especially that it would not be superseded by the action of that body. Suppose Langdon had not been appointed until after the meeting of the Legislature of 1857; then this case would have been precisely that of *People v. Fitch*.

If the appointment by Governor Johnson of Langdon, if made in January, 1857, would have been made to yield to Aylett's election in March, how is it that the appointment of the same incumbent in April, 1856, could supersede the right that the Legislature retains to elect a resident-physician on joint-ballot? There is surely nothing in the time of year, and Governor Johnson possessed no more power in April, 1856, to control the elective right of the Legislature, than he did in 1857.

An attempt will be made, as we have before suggested, to make this case turn upon the twelfth section of the Act creating the insane asylum. It is said that the interpretation of the eighth section of the fifth article is not involved, because in this case a mode of filling a vacancy is provided by law. If Judge MURRAY's views, in Well's case, are correct, and really we do not see that they admit of argument, then the word mode, in the eighth section, only refers to the manner or means by which the vacancy is to be filled. If this be so, the law provides no other mode than that pointed out by the Constitution, viz: appointment by the Governor. It is, therefore, merged in the constitutional provision, and so this Court seems to have considered it in Reid's case. There they treat this very appointment of Langdon as one made by the Governor, under and by virtue of the eighth section of the fifth article of the Constitution.

[11] *The appellant, foiled in the attempt to sustain his claim under any mere power of the Governor to fill a vacancy, whether derived from the Constitution or the statute, seeks to bring this appointment under the authority to fill the office. He says the Legislature could have bestowed upon the Governor the power of appointment to office, instead of providing for the election by joint-ballot; and he concludes that if they could authorize his appointment for the whole term, *a fortiori*, they might empower him to appoint for a part of the term.

"The power to appoint to an office carries, by implication, the power to fill a vacancy in such, and all necessary authority to carry out the original power and prevent its becoming inoperative."

We think the appointing power of the Governor must grow in favor with the Supreme Court, before they can be brought to construe the fifth section of the Hospital Act as intending to provide that the first physician shall be elected by the Legislature, and all subsequently shall be appointed by the Governor. Why, in Reid's case, the Court and Langdon's counsel all talked about the vacancy occasioned by the failure of the Legislature

to elect. These are the very words of the Court: "The failure of the Legislature to elect." How could they fail to do that which by law they could not do?

The argument of the appellant's counsel is undoubtedly ingenious, as his arguments always are, and is as able as the nature of the case will permit; but we think it needs no further notice at our hands.

MURRAY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

The act creating the office provides, that the officer shall hold his office for two years, and until his successor is appointed and qualified.

It will be observed, that at the date of Langdon's appointment, the term of Reid had expired. Immediately upon the appointment of Langdon, a proceeding was instituted to determine the rights of the parties to the office; Reid contending that he was entitled to continue in office, until his successor was elected and qualified by the Legislature. This question was fully considered in the case of "*People v. Reid*," 6 Cal. 288, in which it was held, that the law creating the office had limited the term of the incumbent to two years, and that the words "until his successor shall be appointed and qualified," were not intended to extend the term indefinitely, but to prevent an interregnum in the office, by authorizing the old incumbent to act as a *de facto* officer until such time as the appointing power, or the power to fill vacancies, could act on the subject.

The appellants now contend, that after Reid's term expired, *the Governor had authority to fill the office for [12] the whole term, and second, that the Governor had power to fill a vacancy in the office until the end of the unexpired term.

I shall consider the second proposition first in order. The tenth section of the act provides that, "if any vacancy shall occur in the office of resident, or assistant-physician, such vacancy shall be filled for the unexpired term by appointment of the Governor." The eighth section of the fifth article of the Constitution of this State provides, that when any office shall, from any cause become vacant, and no mode is provided by the Constitution and laws for filling such vacancy, the Governor shall have power to fill the same by granting a commission, that shall expire at the end of the next session of the Legislature, or the next election by the people."

In the case before us, the law has provided for filling the vacancy, by appointment for the balance of the unexpired term. Waiving the question, whether the Legislature could constitutionally provide for filling a vacancy beyond the period when the appointing power could act upon the subject of the vacancy, it becomes of the first importance to ascertain what is meant by the words "unexpired term;" whether they relate to the office or officer. The counsel for the appellant has very ingeniously assumed that the legal term of the office is two years; that the

term commenced to run from the date of Reid's commission, and that there was a fraction of the term at the date of the defendant's appointment.

This is a mere *petitio principii*. If it is to be taken for granted, that the Legislature has fixed distinct terms for the office, which commence and terminate on particular days, then the case of the relator is at an end.

The error of the argument, in my opinion, consists in assuming that the term of the office, and of the officer, are one and the same, when in point of fact, there may be no term in an office, but a term in the incumbent. In other words, that there are no fixed periods whereby a term, as apart from the officer, begins and leaves off. To illustrate the distinction more fully, the term of the office of Judges of the Supreme and District Courts is fixed at six years. These offices become vacant at a particular point of time, and if no person is appointed or chosen to fill them at the time provided, he who is afterwards elected only takes the remainder of the unexpired term of the office.

In the act under consideration, there are no words employed, which, even by implication, would warrant us in assuming that the Legislature intended to create distinct terms in the office of resident-physician, as contradistinguished from that of the officer, or that any term commenced running in the office, except from the induction of the incumbents, but, that they simply intended to provide for the duration of the office of the incumbent. For the purpose of ascertaining the intention, let us look for a moment at the practical workings of the construction contended for by the defendant. Reid was elected on March 27, 1854. Now, admitting that the term of the office commenced running from that date, it must expire on the 28th of March, 1856. If, then, the Legislature which was the appointing power, and which was in session, and in a situation to act, failed by some accident to elect before the 30th, such election would be void, and after one hour, or one day of the new term had commenced, even although the Legislature was in session, the Governor would have the right to appoint for two years, minus the day, or hour that had expired. Or again, the Legislature may fail to agree in an election; will such failure be construed to deprive the succeeding body of a power of appointment which they have reserved to themselves?

[13] Let us suppose that the Legislature had elected some one in the place of Reid, one month after his term expired, from what period of time would the commission of the new incumbent, have dated—from the expiration of the two years that Reid was authorized to hold, or from the date of his election? Most certainly from the latter, for the law says the officer shall hold his office for two years. Now, if there was a term in the office, and the party had not been elected until one month after the expiration of the old term, it is evident that he could not hold but one year and eleven months, instead of the two years that the law says he shall.

In the case of *Shelby v. Johnson* (Dalham, 597), the Supreme Court of Texas (a case very similar to the one under consideration,) use this language: "When the incumbent is removed by death, the office becomes vacant and returns to the appointing power. It cannot either in reason or the nature of things, be affected by the nature of the deceased, unless the creative law carries out a definite and precise period for the beginning and termination of the term of the said office, whether the same has been holden by one or more incumbents." When we come to consider that the Legislature have retained in their own hands the appointment of this officer, I think, that the conclusion is irresistible, that the language of the twelfth section was not designed to apply to the unexpired term of the office, but of the officer or incumbent, and that where the office has become vacant by reason of the expiration of the term of the incumbent, and the failure of the Legislature to elect, that then the general law of the State defining vacancies in office, and the mode of filling the same, would govern.

By adopting this construction, both Acts can be upheld, and any apparent or real incongruity reconciled.

Again, the office of resident-physician was created on the 17th of May, 1853, and the Legislature adjourned on the *19th of May without electing an officer, and after said [14] adjournment the Governor appointed Reid, who was elected the 24th of March, 1854. Now, adopting the reasoning of the defendants, and how stands the case upon this state of facts? According to their view, as soon as the Legislature adjourned without electing, a vacancy occurred in the office. The term must have commenced running from the 19th of May, and as Reid was not appointed until after this period, he was appointed to fill the residue of the term which would expire the 19th of May, 1855, but the Legislature elected him in March, 1854. Now this election, made more than one year before a vacancy would occur, and in derogation of the rights of a succeeding Legislature, which might claim that they alone were competent to elect this officer, was either legal or void. If, legal, then Reid held until the 19th of May, 1855, by virtue of his appointment by the Governor, and two years more by his election, which would make his term expire on the 19th of May, 1857, so that there was no vacancy in the office at the date of Langdon's appointment, and Aylett, the relator, having been duly elected by the Legislature to fill the next term, would be entitled to the office.

If, on the other hand, the Legislature of 1854, had no power to forestall the Legislature of 1855, by electing the officer, and said election is void, then Reid's term, as the appointee of the Governor, expired on the 19th of May, 1855, from which point of time a new term commenced running, which would expire May, 19, 1857. Langdon having been appointed (as contended for) on the 29th of April, 1856, was only appointed for the balance of the unexpired term, which ended on the 19th of May, 1857,

and the relator having been elected March 13, 1857, is entitled to the office. So that if we adopt the argument of the defendant, he has, by his own showing, lost his case. But, we decided, in the case of Reid, that there was a vacancy in the office, and this decision could not have been made if we had been of the opinion that there was a term in the office, other or apart from that of the incumbent. This construction has been given to the act by two Legislatures, and if the case were a doubtful one, this legislative exposition would be entitled to consideration.

We are satisfied that there is a substantial difference between the term of an office and the term of the officer, or incumbent, and that the twelfth section of the Act under consideration applies to the unexpired term of the officer. Adopting this as the true construction, there is no difficulty whatever on this branch of the case, for a vacancy may exist in an office for which there are no terms fixed by law. This, as before remarked, may occur from a failure to elect or appoint. In such cases, it is made the duty of the Governor to grant a commission to fill [15] such vacancy *until the appointing power can act. The power to fill a vacancy and the power to fill an office are distinct and substantive powers.

In the case of *People v. Fitch*, 1 Cal. 519, this Court say: "The right of the Legislature to elect and control the State Printer, cannot be defeated by any inference in favor of the appointing power of the Governor." Again, in the case of *The People on the relation of People v. Miner*, 7 Cal. 519, this Court uses this language: "It would seem that the evident intent and whole spirit of the Constitution of the State was to limit the patronage of the Executive within very narrow bounds. This is seen from the fact that the only office created by the Constitution in which the Executive constitutes any part of the appointing power, is the office of Secretary of State. This is further shown by the provisions of the eighth section of Article V, which limits the duration of an appointment of the Governor, in cases of vacancy, to the next election by the people, or the next session of the Legislature, except when a different rule is specially provided by statute. The power to fill vacancies had to be vested in some department of the government, and the Constitution was compelled to vest it in the Executive, because the only department that could be properly and efficiently charged with such a duty. But the Constitution carefully limited this power to fill vacancies for the time only, and when the appointing power for the whole time can act, the appointment of the Executive for the time being ceases."

If the Court is correct in its former opinions, as to the theory of our Constitution, and the policy which it was the intention of its framers to establish, then every intendment and implication of law would be in favor of the appointment of the relator, unless the language of the statute under which the defendant claims was most clear and explicit. It is true, that the lan-

guage of some of the opinions of this Court would seem to establish that there was no difference between the term of an office and of its incumbent, but the question was not made in any former case.

Having thus disposed of this point, we will now consider the first proposition: that the Governor had power to fill the office for the whole term.

The appellant contends that, under the third article, and the sixth section of the eleventh article of the Constitution, the Legislature have no power to elect an incumbent to an office. The third article provides for the distribution of the powers of government between the executive, legislative and judicial branches of the government, and forbids those charged with duties belonging to one, from exercising functions appertaining to another department. Under this provision, it is urged that the Legislature may create the office, but cannot elect the officer; that it would be exercising power belonging to the executive branch of *the government, or to the people. Un- [16] happily for the argument, there is no fourth branch of the government recognized by the third article of the Constitution, which is represented by the people, and if there is any encroachment upon any other department, it must be upon the Executive.

The power to fill an office is political, and this power is exercised in common by the Legislatures, the Governors, and other executive officers, of every State in the Union, unless it has been expressly withdrawn by the organic law of the State. That it has not been by our Constitution, there can be no doubt: first, because there is no clause that would warrant such a construction, and, second, because there are several that would forbid it.

But it is said that this power is taken away by the sixth section of the eleventh article, which provides that "all officers, whose election or appointment is not provided for by this Constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people, or appointed, as the Legislature may direct." Much stress is laid upon the word appointed, as used in this section. This is mere hypercriticism; the former decisions of this Court have substantially settled this point. The word appoint was probably used as a more comprehensive term to convey the idea of a mode of constituting or designating an officer, whether by election or otherwise. In fact, the words "elect and appoint" seem to have been regarded as synonymous by the Convention.

The third section of the sixth article requires the first Legislature to elect Supreme Judges, and the fifth section of the same article provides that the District Judges shall be "appointed by the joint vote of both houses."

It would be useless to pursue this argument further; this power has been always exercised by the Legislature, and never before denied. It is not prohibited by the Constitution, and ac-

according to the theory and spirit of our institutions, is safer when exercised by the immediate representatives of the people, than when lodged in the hands of the Executive.

From the foregoing, our conclusions are: first, that the Governor had no power to appoint for the full term; second, that the commission of the defendant expired as soon as the Legislature elected the relator; and, third, that the relator is entitled to enter upon, and discharge, the duties of the office, for the full term of two years from the date of his election.

Judgment affirmed.

BURNETT, J.—I concur with the Chief Justice in confirming the decision of the District Court, and generally in the positions taken by him. In any view that can be taken of this case, I think the relator entitled to the office. The only difficulty with *me arises from the language of the twelfth section of the Act creating the asylum, which is as follows:

“If any vacancy shall occur in the office of resident-physician, such a vacancy shall be filled for the unexpired term by appointment of the Governor.”

The phrase “any vacancy,” is broad and general, and without any express restriction; and at first would seem to embrace every vacancy, whether occasioned by the failure of the appointing power to act, or by the happening of some event after the commencement, and before the termination of the term. When I drew up the opinion in the case of *People v. Mizer*, I was under the impression that this was the correct construction. The question was not at all material to the determination of that case, and therefore did not receive full consideration. But in the present case, it becomes material, for the purpose of determining when the term of the relator commenced.

There would seem to be no doubt of the power of the Legislature to create the office, to designate the term, and the mode of filling all vacancies, however occasioned, and also to fix the duration of the appointment to fill the vacancy. In a word, the office being one purely of legislative creation, the Legislature had full power over the entire subject. The Legislature, then, had the perfect right to enact, that all vacancies in this office should be filled by the Governor for the unexpired term; and by the term, I understand the period of two years, for no other term is mentioned by the Act, and the language must refer to the term as defined by the Act itself.

The whole question is one of statutory construction. What did the Legislature mean by the word vacancy, as used in the Act? What definition, if any, had the Legislature previously given of this word?

It would seem that there are only three classes of officers created by the Constitution and statutes of this State: 1. When the office is held at the pleasure of the appointing power. 2. When the term commences upon a day certain, and runs for a

definite period. 3. When the duration of an office is designated, but the commencement of the term is dependent upon an event that may or may not happen upon a particular day.

So far as my opportunities for examination have enabled me to judge, this classification is correct, and this case must fall under either the second or third class.

It would seem to be true, that in all cases where it was intended that the term of the office should run independent of the incumbent, that a day certain has been designated when the term should commence; and this, taken in connection with the prescribed duration of the term, determines the period of its termination. By the Constitution of the State, Judges of the Supreme and District Courts, hold their offices from a day, and for a term *certain. And by the provisions of [18] the Act concerning offices (Comp laws, 239), the Clerk of the Supreme Court, Superintendent of Public Instruction, county judges, clerks, sheriffs, coroners, assessors, treasurers, surveyors, recorders, and district attorneys, all hold their offices in the same way. But the Governor, Secretary of State, Comptroller, Treasurer, Attorney-General, and Surveyor-General, all hold their offices for a given period, which runs from the time of their installation in office.

If, then, the Legislature, in reference to those offices, each term of which was to be of the same duration, and each to commence running from the same period of time, and all the terms, except the first, to succeed each other in the same fixed order, has been so careful as to specify the exact day for their commencement, it would seem to follow, that the same express designation of the time for the commencement of each term of this office would have been made, had the intention been the same. But there is no specific time designated; and if, notwithstanding this fact, we hold that the time was intended to be fixed when the first and all succeeding terms should commence running, what day shall we assume?

The Act creating the office was passed on the 17th of May, 1853, and took effect from and after its passage. The office itself was then in existence from the passage of the Act, and if the term commenced running at any fixed period, that period was the day when the Act took effect; for if the first term of the office did not commence at the passage of the Act, but upon the happening of some subsequent and uncertain event, then there was no specific period for its commencement intended by the Legislature. If, then, the commencement of the first term was not fixed, but was made dependent upon a subsequent event, uncertain as to the time when it might occur, it follows that the commencement of the second, and all succeeding terms, must depend upon the recurrence of the same uncertain event. The language of the statute applies equally to the duration and the commencement of all the terms; and as the same duration is designated for the first and all succeeding terms, so the same commencement must also appertain to all. The statute makes

no distinction between any of the terms, either as to their duration or commencement. Whatever rule, therefore, we adopt for the first, must equally apply to all succeeding terms. The office, from the tenor of the Act, was intended to exist for an indefinite time, and the succession of many terms must have been contemplated.

If, then, the commencement of the first term was the passage of the Act, then each succeeding term would commence on the same day of the same month. But if the first term only commenced to run upon the happening of a subsequent event, un-

certain as to the time when it would occur, then each
[19] succeeding term *would depend for its commencement upon the happening of the same uncertain event. For example, if the first term only commenced running from the election of Dr. Reid by the Legislature, then the commencement of the second term would be when his successor should be elected; and this rule applies to all the offices of the State, falling under either the second or third class. The terms of the offices belonging to the second class must succeed each other in a regular and fixed order, while the terms of offices of the third class may succeed each other irregularly. For example, each Governor holds his office for two years from the time of his installation; and then, therefore, the commencement of the term of his office does not absolutely depend upon the time when the term of his predecessors commenced to run. While his term of office may not commence at an earlier period of the year, it may commence later.

If the first term commenced running either at the date of the Act, or upon the adjournment of the Legislature, on the 19th of May, 1853, then any appointment that the Governor could make in the recess of the Legislature, and before the election of Dr. Reid, in March, 1854, must have been for the unexpired term. And as the Governor, under the Act, had the sole power to appoint for the unexpired term, the Legislature had no power to elect Dr. Reid for the same period.

But if the first term did not commence to run until the election of Dr. Reid, in 1854, then there was no part of an unexpired term existing before that election, which the Governor could fill by virtue of the twelfth section. If, then, the Executive could fill the office by appointment, between the date of the Act, and that of the election of Dr. Reid, it must have been under the provisions of the eighth section of the fifth article of the Constitution. As the Executive constituted no part of the appointing power to fill this office for the whole term, and, as he constituted the sole power to fill vacancies, it follows that any appointment he could have made before the election of Dr. Reid, must have expired, either at the end of the term, or at the end of the next session of the Legislature. For upon any theory we may please to adopt, the Governor could only appoint to fill a vacancy; and such appointment must terminate, either at the time designated by the Act, or by the Constitution.

If, then, we take the theory to be true, that the term did not commence to run until the election of Dr. Reid, it is clear, that any appointment made by the Governor anterior to that election, could not have been made under the twelfth section of the Act. And from the same premises it follows, that either there was no vacancy in such a case, and the Governor, therefore, had no power to fill it, or there may be a vacancy not contemplated by the Act. In other words, the vacancy in such case was a vacancy as defined by the Constitution, and not by the statute.

*In what sense, then, did the Legislature use the word [20] vacancy? It is certain that, whatever vacancy was contemplated by the Act, was expressly directed to be filled for the unexpired term, by the appointment of the Governor. From this, it is equally certain, that the term must be running before such a vacancy could exist; and, it would seem also certain, that such term could not run apart from the officer, unless we assume some designated day upon which it commenced.

To ascertain the meaning of a writer, in the use of a certain term, his previous definition of that term, if he has given one, will be very strong, if not conclusive proof of the sense in which he uses it. So, in reference to the sense in which the Legislature may employ a certain term, the best method is to look to the sense in which it has been previously employed by that body. The sense of the term, as used in the Constitution, will not constitute so good an index to the intention of a statute as the usage of the Legislature itself.

In the Act concerning offices, passed April 28th, 1851, article six, section thirty, the word vacancy has received a legislative definition, and as there defined, it means only a vacancy occurring by the happening of some event during the term, such, for example, as death, or resignation. So far as I have been able to ascertain the fact, this is the only sense in which the term was ever used by the Legislature, before the passage of the Act creating the asylum.

The conclusion is, that in this Act the term vacancy is used in the same sense in which it had been previously employed by the Legislature. By the Act, it was made the duty of the Legislature to elect a resident-physician, and it seems never to have entered into the contemplation of that body, that there would be a failure to elect in the mode prescribed, and for that reason no provision was intended to be made for such contingency. There being no provision in the Act itself for filling such a vacancy, the eighth section of the fifth article of the Constitution will apply, and under its express provisions the commission granted to Langdon must have expired upon the adjournment of the last Legislature. Had the Legislature elected a successor to Dr. Reid, and had the office afterwards become vacant during the term, and the vacancy had been filled by the appointment of the Governor, such appointment would have been for the unexpired term. This office, I think, falls under the third class I

have mentioned; and the term never runs apart from the officer, and only commences running from the date of his election. And under the Constitution of this State, there may be a vacancy in an office before the particular term begins to run.

[21]

*WEBSTER v. HAWORTH.

EXECUTION SALE, RELIEF OF PURCHASER.—Where a party purchased real estate, at an execution sale, upon the faith of the representations of the judgment-creditor, that his judgment was the first on the property, when, in fact, there were prior incumbrances on it of more than its value: *Held*, that the purchaser should be relieved, and the judgment-creditor should be estopped from claiming an advantage resulting from his own misrepresentations.

IDEM.—It makes no difference whether the misrepresentations were made willfully or ignorantly, or that the action against the purchaser was brought in the name of the sheriff.

IDEM.—**CAVEAT EMPTOR.**—Ordinarily, the maxim of *caveat emptor* applies to judicial sales, but it has many limitations and exceptions.

ATTACHMENT, AMENDMENT OF RETURN.—The return on an attachment cannot be amended so as to postpone the rights of creditors attaching subsequently, but before the collection.

APPEAL from the District Court of the Fifth Judicial District, County of San Joaquin.

This is an appeal taken by the defendant from a judgment rendered against him in the Court below, in an action brought by the sheriff of San Joaquin County, against defendant under the two hundred and twenty-fourth and two hundred and twenty-fifth sections of the Practice Act, to recover the sum of six hundred and seventy-five dollars—a loss alleged to have been sustained by reason of defendant refusing to pay the amount bid by him for certain property in the City of Stockton, viz: Lot 11, block M, west of Centre Street, with the improvements thereon, at sheriff's sale thereof, under an execution issued from the District Court of San Joaquin County upon a certain judgment therein recovered by one William M. Ryer in a certain cause against Adams & Co.

Defendant, upon the trial, admitted the rendition of the judgment in the case of *Ryer v. Adams & Co.*, the levy and sale under the execution issued therein; that defendant purchased the same at such sale, and subsequently refused to pay the amount of his bid.

That he had notice from the plaintiff of the resale of said property; that said property was resold, and that the difference in the price at the different sales was six hundred and seventy-five dollars, but contended that the sheriff, although nominally plaintiff, was not the real party in interest, but that one Wm. M. Ryer, was, at the time of the sale of the property as aforesaid, to defendant, the real party in interest; that said Ryer, who was the owner of the judgment, under which the sale was made, was present at the sale, and for the purpose of inducing defendant to purchase the same, falsely and fraudulently represented

that the judgment under which the property was to be sold, was the first and paramount lien, attachment, or incumbrance upon the same, and that if defendant would purchase the same, he would thereby acquire a full and unembarrassed title thereto.

*That since said sale, as aforesaid, defendant had discovered the representations of plaintiff to be false and untrue, and that the said judgment of *Ryer v. Adams & Co.*, was not the first or paramount lien upon the said property, but that it was an inferior one, and subject to other liens, amounting in value to more than the value of the premises sold. [22]

The testimony of Hyer, a witness on the part of the defense, was as follows:

"I asked the sheriff how the property was to be sold. He referred me to Doctor Ryer. I asked Doctor R. how the property was to be sold, and if his lien was the first and paramount lien. He told me that it was; that he had discovered the property himself, and had caused the first attachment to be levied upon it, and that all he wanted was to get his money out of it. I then said: 'So, if we buy under the execution, we will obtain a title which will be superior to any lien, judgment, or attachment, against Adams & Co.' He replied that we would. I then turned to defendant, Haworth, and told him that he might bid upon the property, and if it was not as Ryer said, he would not be bound by his bid. Defendant bid on the property under those representations."

It was further shown that on the 18th of July, 1855, Ryer commenced suit by attachment against Adams & Co., but the sheriff's endorsement upon the writ which was filed in the recorder's office on the 29th of August, 1855, showed that the levy was not made upon the premises brought in by Haworth, to wit: lot 11, block M., west of Centre street, but upon block 11, lot N., west of Centre street. That this mistake was corrected by the order of the Court in January, 1856, but that in the meantime, various judgments had been rendered against Adams & Co., the liens of which held the property, and that, in the aggregate, they exceeded the value of the property bid in by Haworth.

The Court below found, among other things, that the representations of Ryer were not falsely and fraudulently made, and rendered judgment for plaintiff for six hundred and seventy-five dollars, and costs, from which this appeal was taken.

Winans & Hyer, for Appellant.

The attachment of Ryer, the actual plaintiff, was not a first and paramount lien on the premises sold. It was no lien at all on them.

1. Because, before the levying of the said attachment, the premises had been conveyed from Alvin Adams, the admitted owner, by I. C. Woods, his attorney, to James Birch, to whom

possession was delivered; then by Birch to California Stage Com-*pany, to whom possession was delivered; [23] then by California Stage Company to Dillon, to whom possession was delivered; and all the conveyances had been recorded, in their due order, in the office of county recorder of San Joaquin County.

But the plaintiff contends that the levy of the attachment was valid, because the power of attorney from Adams to Woods did not appear of record.

This proposition is not tenable. Even though a deed prior to the levy of an attachment is unrecorded, yet, if possession followed the delivery of the deed, such possession is implied notice to the attaching creditor, and as effectual a public notice as a registry, and an attachment levied on the property, in disregard of such notice, creates no lien. (*Priest v. Rice*, 1 Pick. 167.)

2. Because the attachment, as filed in the recorder's office, did not show a levy upon the premises in question, but upon other premises. There was no copy filed with the recorder, containing, or together with, a description of the property attached, as required by section one hundred and twenty-five of the Practice Act.

An attachment is in derogation of the common law, and it is to be executed in strict accordance with the statute. (*Moore v. Hamilton*, 2 Gil. 429; 27 Me. 449; 21 Pick. 197-199; 1 Tex. 17; 20 Vt. 612.)

To constitute notice, it must be served and executed in the manner pointed out by law. (*Davenport v. Lacon*, 17 Conn. 278.)

To give it effect, it must appear affirmatively that the statute has been complied with. (*Cox v. Johnson*, 12 Vt. 65.)

The statute must be complied with by a proper filing. (*Tarpley v. Homer*, 9 Sme. & M. 310.)

Courts will only give effect to the return of officers when the intention is sufficiently disclosed by the language used, otherwise not. (*Hathaway v. Larrabee*, 27 Me. 449; *LeBarron Putnam v. Hall*, 3 Pick. 445, and cases there cited; *Kittredge v. Bellows*, 7 N. H. 399; *Sargeant v. Pearce*, 2 Met. 80.)

3. The rights of a subsequently attaching creditor will not be affected by the amendment of a mistake in the first attaching creditor's writ, though appearing manifestly on the face of the writ to be a slip. (*Danielson v. Andrews*, 1 Pick. 156; *Wills v. Crocker*, 1 Pick. 204; *Fairfield v. Baldwin*, 12 Pick. 385, 395.)

Conceding all that respondent claims in his brief, viz., that the doctrine of *caveat emptor* applies to purchasers at sheriffs' sales, yet this sale does not refer to cases where the party, on whose behalf the sale is made, and who alone is interested therein, makes representations and statements that the title is good, when it is not. In such cases, another and higher doctrine of the law steps in, viz., that "no man can take advantage of his [24] own *wrong." (*Pichard v. Sears*, 6 Ad. & EL. 469; *Gregg v. Wells*, 10 Id. 90, 98.)

And this applies, whether the misrepresentation is willful or unintentional, if the other party be misled or injured by it. (*Har-rison v. Ruscoe*, 15 Mees. & W. 231; *Broom's Leading Maxims*, 3 Ed. 1852, p. 206; 2 Phillips on Evidence, C. and H. notes, 200; *Welland Canal Co. v. Hathaway*, 8 Wend. 489; *Tufts v. Hays*, 5 N. H. 453; *Swartz v. Moore*, 5 Serg. & R. 257 *et seq.*; *Gosling v. Birnie*, 7 Bing. 339; *Stephens v. Baird*, 9 Cow. 274; *Wallis v. Truesdale*, 6 Pick. 455; *Hollister v. Johnston*, 4 Wend. 642; *Den v. Oliver*, 3 Hawks, 479.)

The misrepresentation having been the inducement of the other party to act, operates by way of estoppel on the party misrepresenting, and he is estopped from taking advantage of his misrepresentations, or denying the truth of that which he alleged to be true.

Baine & Boulden, for Respondent.

The appellant failed to show that the representations made by Dr. Ryer, the party for whose benefit the lot was sold, were made with a fraudulent intent, as matter of fact. Nor do the representations proven amount to fraud in law. There was no relation of confidence and trust existing between the parties. They were strangers to each other, in person, in business, and in interest. Haworth acted mainly in the matter by his attorney and legal adviser. The same means of knowledge, the records, were open to the appellant Haworth, and his legal adviser, as to Dr. Ryer. It was gross negligence, in the appellant and his legal adviser, to apply to a doctor of medicine, instead of examining the records, to ascertain the condition of the title to the property he was about to purchase. (See 1 Story's Equity, 5th edition, secs. 191-208, Sec. 200 a; *Anderson v. Bennett*, 5 How. Miss. R. 167; *Bell v. Henderson*, 6 Id. 313.)

The questions of title to the lot purchased, and priority of liens, cannot be inquired into in this suit. The rule *caveat emptor* applies in all its strictness, in sales made by sheriffs. (11 U. S. Digest, p. 213, Sec. 37, p. 214, Sec. 48; 7 Id. p. 249, Sec. 85, p. 250, Sec. 111; 2 Bailey S. C. 480.)

But Ryer's attachment was, in point of fact, the first attachment on the lot, and his lien attached from the time the Sheriff entered upon the land for the purpose, and actually posted a copy of the writ on the land. From that time the property was retained by him, to answer Ryer's judgment. (Pr. Act, Sec. 130.) The filing the copy of the writ, and description of the property attached, in the recorder's office, and the subsequent amendment, by relation, refer to the first act, that of posting the writ upon the premises. (*Jackson ex dem. De Forest v. McMitchell*, 3 Cow. 75. For the amendment, see 5 How- [25] ard, 173; 4 Sme. & M. 409.)

MURRAY, C. J., delivered the opinion of the Court--TERRY, J., concurring.

This action was brought under the two hundred and twenty-

fourth and two hundred and twenty-fifth sections of the Practice Act, for an alleged loss arising from the refusal of the defendant to pay for certain property purchased by him at sheriff's sale. The answer admits the facts charged in the declaration, but alleges that the defendant was induced to purchase, through the misrepresentation of Ryer, the real party in interest, the sheriff being only a nominal party. The testimony shows that the property in question was sold at sheriff's sale to satisfy a judgment of Ryer; that immediately before the sale took place, the defendant, through his attorney, inquired of Ryer, who was present, whether his judgment was the oldest lien on the land, and whether the purchaser at the sale would obtain a clear title to the same, free from all incumbrances. Ryer replied that his was the oldest attachment and judgment, and that the purchaser would take the property clear of all charge or incumbrance. Upon the faith of these representations, the defendant purchased; afterward, it turned out that Ryer's judgment was not, in point of fact, the oldest lien upon the lot sold, and that there were incumbrances upon it to more than twice its value. Ryer's attachment was levied on the 18th of July, 1856. The one hundred and twenty-fifth section of the Practice Act provides that real property shall be attached by leaving a copy of the writ with the occupant thereof, and filing a copy, together with a description of the property attached, with the recorder of the county.

The return of the sheriff, filed in recorder's office, shows that the attachment was levied on lot eleven, in block N, and not lot eleven, in block M. This was afterwards corrected on application to the District Court, but before the correction was made other attachments had intervened.

It will hardly be necessary to enter into any argument to show that the first attachment could not bind property not described in the return of the officer, and that the subsequent attaching creditors were not postponed to the satisfaction of Ryer's judgment. The case, then, turns upon the question whether Ryer is estopped by his declarations and representations made to Hyer, the attorney of the defendant.

In this view of the case, it is immaterial whether Ryer made such representations, knowing them to be false, or whether he was ignorant of the facts altogether. (1 Story's Eq. Jur. Sec. 193.) It is sufficient, if they were untrue, and at the same time a material inducement to the purchase, and that the defendant acted *on the faith of them, which is indubitably true. It is said that the maxim "*caveat emptor*," applies to judicial sales, and that the defendant cannot avail himself of the misrepresentations of the plaintiff, as he had access to the records of the county, and might have informed himself upon the subject. Grant that the maxim *caveat emptor* applies to sheriffs' sales, it has never been carried to the extent that such a sale could not be impeached on the ground of fraud or misrepresentation. The maxim only applies thus far, that the purchaser

is supposed to know what he is buying, and does so at his own risk. But this presumption may be overcome by actual evidence of fraud, or it may be shown that in fact the party did not know the condition of the thing purchased, and was induced to buy upon the faith of representations made by those who, by their peculiar relations to the subject, were supposed to be thoroughly acquainted with it. The fact that the defendant might have examined the public records does not alter the case. Before such an examination could have been had, the sale would have been over, and he would have lost the opportunity of the purchase. If, under these circumstances, he applied to the judgment-creditor for information, and, acting upon that information, was misled to his prejudice, he should be relieved, and the actual party in interest estopped from claiming an advantage, resulting from his own misrepresentations of facts, whether willfully or ignorantly made.

Judgment reversed, and cause remanded.

ANTHONY v. DUNLAP.

1 INJUNCTION, NOT TO RESTRAIN CO-ORDINATE TRIBUNALS.—Courts have no power to interfere with the judgments and decrees of other Courts of concurrent jurisdiction.

1 IDEM.—WHEN ALLOWED.—The only case in which it will be allowed, is where the Court in which the action is pending, is unable by reason of its jurisdiction, to afford the relief sought.

APPEAL from the District Court of the Fifth Judicial District, County of Tuolumne.

Paul B. Anthony filed a bill in the Court below, for the purpose of perpetually enjoining all proceedings on a judgment recovered against him in the District Court of the Sixth Judicial District, by the defendant; alleging that he had no notice thereof, etc. Defendant demurred to the bill, which was sustained, and final judgment entered for defendant, from which, plaintiff took this appeal.

H. P. Barber, for Appellant.

Robert F. Morrison, for Respondent.

*MURRAY, C. J., delivered the opinion of the Court— [27] BURNETT, J., concurring.

This was a bill in equity filed in the Fifth District Court, to enjoin the execution of a judgment obtained in the Sixth District.

We have before decided, that one Court had no power to interfere with the judgments and decrees of another Court of

1. Approved *Ulfelder v. Levy*, 9 Cal. 614; *Crowley v. Davis*, 37 Cal. 269; *Platto v. Deuster*, 22 Wis. 436.

See *Resalk v. Kraemer*, post 66; *Chipman v. Hibbard*, post 268.

concurrent jurisdiction. The only case in which it will be allowed, is where the Court in which the action or proceeding is pending, is unable by reason of its jurisdiction to afford the relief sought. Any other rule would lead to inextricable confusion.

Judgment affirmed.

GOODALE v. SCANNELL.

REPLEVIN, ESTOPPEL OF CLAIMANT.—To estop a party from claiming goods as against the creditor of a third party, it must appear that he stated to the creditor himself that he had sold the article to a third party, and that the creditor parted with some right, at advantage, on the faith of the information.

APPEAL from the Superior Court of the City of San Francisco.

Samuel P. Goodale brought this action to recover of the defendant, as sheriff, one hundred and fourteen barrels of sugar, or their value. The defendant justified the taking, under execution process, against one George Frank. On the trial, it appeared that in September, 1856, the plaintiff Goodale being the owner of a lot of China sugar, in mats, made a certain contract with Frank, under which the sugar was delivered to him. The evidence as to whether the contract amounted to a sale or not, was conflicting. The substance of the testimony is, that Goodale delivered the sugar to Frank, under a contract that Frank was to repack it in barrels, mix it with molasses, so as to change its character, and account to the plaintiff for the original article at nine and one half cents a pound, and all over that sum to be divided between Frank and Goodale. Goodale gave out that he had sold the sugar, and did not wish it known that he was interested in it. The Court below, sitting as a jury, found that plaintiff had never sold the sugar, and thereupon rendered judgment against defendant for the return thereof, or for its value. Defendant moved for a new trial, which, being denied, he appealed.

Janes, Lake & Boyd, for Appellant.

We insist that this contract was, in effect, a sale of the sugar to Frank.

The defendant's counsel asked the Court to rule, as a [28] matter of law, that if the plaintiff gave out to the public, that he had sold the sugar to Frank, and gave over to him the possession, then, as to Frank's creditors, it was his property, and subject to be levied upon and seized for Frank's debts.

The Court refused so to rule, and the defendant excepted.

To determine whether this was error, it is only necessary to ascertain, whether, in case the cause had been tried by a jury, it would have been error for the judge to refuse an instruction,

embodying the above rule of law. (*Griswold v. Sharp*, 2 Cal. 23.)

We submit, that a refusal so to charge, would have been clearly erroneous.

The evidence shows, (though it is enough for our purpose if it tends to show,) that Goodale gave out that he did not own the sugar; that he had sold it.

The business connected with transforming it was done in Frank's name. After it was repacked, it was stowed at the warehouse in Frank's name. Goodale kept his interest in the affair intentionally secret; no one knew or suspected that he was a secret partner or owner, till other creditors of Frank sought to make their debts out of the property; the possession and apparent ownership of which, by Frank, had been the means of his obtaining the credit.

The law will not permit a person to vest the possession of his property in another, together with all the *indicia* of title; to disclaim any interest in it, and, when a credit is obtained on the supposed ownership of the person in possession, to step forward and reclaim the property.

C. H. S. Williams, for Respondent.

The contract under which the sugar was delivered, by the plaintiff, was clear and explicit, and cannot be tortured into a sale; and there is no conflict of evidence upon the subject.

A Judge cannot be required, even on a jury trial, to charge upon an abstract question of law, however correctly stated, which is not based upon evidence sufficient to sustain a verdict.

Here there was no evidence to sustain a finding, that he "gave out to the public," as stated in the request of the defendant. (*Mansfield v. Wheeler*, 23 Wend. R. 79; 3 Barb. 583; 9 Cow. 208; 2 Hill. 205; 1 Cranch 308-318; 17 Barb. 588-552; 5 Mon. 280-282.)

To make it material, there must be either estoppel *in pais*, or fraud. To estop the plaintiff from asserting his property in the goods, it must appear that the statement relied on was communicated to the creditor who seized the goods, and that he parted with something on the faith of the information.

MURRAY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

*This was an action to recover a quantity of sugar, [29] which had been seized on execution, as the property of one Frank. The defendant contended, on the trial, that the property belonged to Frank, the defendant in execution, and not the present plaintiff. The Court, sitting as a jury, found that the sugar was the property of the plaintiff, and that he had never sold the same to Frank. This is conclusive upon the point, and will not be reviewed by us, as the evidence was conflicting.

The appellants contend that the Court erred in refusing to

decide, as a matter of law, "that if the plaintiff gave out to the public that he had sold the sugar to Frank, and gave to him the possession, then, as to Frank's creditors, it was his property, and subject to be levied upon and seized for his debts."

This instruction was properly refused, because there was no evidence to warrant it. To estop the plaintiff, it should appear that his declarations were communicated to the creditor, who seized the goods, and that he parted with some right or advantage, on the faith of the information. Not only is this fact not shown, but the defendant has failed to show that the plaintiff ever made any statement on the subject.

Judgment affirmed.

PEOPLE v. CHISHOLM.

¹ **EXECUTION LEVY A SATISFACTION OF JUDGMENT.**—A levy under execution, on sufficient property to satisfy it, is a satisfaction of the judgment.

IDEM.—**SATISFACTION OF MORTGAGE.**—Where a judgment is rendered against A. and his sureties, and A. and a portion of his sureties, in order to secure the payment of said judgment, mortgage their property, subsequent to which an execution under the judgment is levied upon sufficient property of B., a surety not joining in the mortgage, to satisfy the judgment, and afterwards is voluntarily released: *Held*, that no action can be maintained on the mortgage, for the levy satisfying the judgment, the mortgage, as an incident thereto, must also be thereby satisfied.

IDEM.—**OBLIGATION NOT REVIVED BY RELEASE OF PROPERTY.**—The voluntary release of the property levied on by the plaintiff in execution, could not revive the obligation on the mortgage given to secure the judgment.

APPEAL from the District Court of the Eleventh Judicial District, County of Yolo.

The State of California, on the 28th of December, 1854, recovered judgment in the Court below against Alex. Chisholm and his sureties, Van Arnam, Tufts, Myrick, and Webb, for the sum of one thousand nine hundred and ninety-two dollars and fifty-nine cents. On the 27th of March, 1855, A. Chisholm, A. J. Chisholm, and C. Chisholm, mortgaged a farm in Yolo county to the State of California, for the purpose of securing the payment of the judgment aforesaid. This was an action to fore-
 [30] close the mortgage, to which the defendants *answered, and on the trial thereof proved that between the time of the execution of the mortgage and the commencement of this suit, the State, as plaintiff, had collected, by means of a levy under the judgment on the property of A. Chisholm, and a sale thereunder, the sum of two hundred and ninety-nine dollars, and that between the same periods of time, the State, as plaintiff, caused another writ of execution to issue from the judgment, and to be levied upon property of Van Arnam, of the value of eighteen hundred dollars, which said property was, subsequent to levy, released therefrom, in the language of the agreed

statement, "by the operation of the statute releasing said John Van Arnam from all liability upon the said judgment, and upon the order of this Court" (the Court below). The statute releasing John Van Arnam was passed in the year 1856. The Court below rendered a judgment of foreclosure in favor of plaintiff, from which the defendants appealed.

Bowie & Griffiths, for Appellants.

Appellants allege as errors of the Court below, that the Court erred in decreeing a judgment of foreclosure, upon the grounds: First, That the mortgage being a secondary liability for the payment of the judgment on said bond, the prior levy upon the property of the original judgment debtors, was a release of those secondarily liable.

Second, The passage of the statute of March 1st, 1856, releasing John Van Arnam, one of the principal obligors, was a discharge of those secondarily liable.

Third, The State of California cannot by law be a party to a mortgage, or seek the sale of property under a decree of foreclosure.

No brief on file for Respondent.

MURRAY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

The levy upon the property of Van Arnam, was a satisfaction of the original judgment against Alexander Chisholm and his sureties. "A levy under an execution on property sufficient to satisfy the same, is a satisfaction of the judgment." (*Mickles v. Haskin*, 11 Wendell.) The mortgage sought to be foreclosed, being given as a security for the judgment, and therefore a mere incident, must fall with it. This consequence cannot be avoided by the Act of 1856, releasing Van Arnam from all liability as surety of Alexander Chisholm.

The voluntary release of the property, by the plaintiff in execution, could not revive a collateral liability upon the part of the defendants, which had already been discharged by operation of law.

Judgment reversed, and bill dismissed.

OSBORN v. HENDRICKSON.

[31]

1 JUDGMENT, INTEREST ON.—A judgment rendered for use and occupation should not draw any interest whatever.

2 BILL OF SALE, HOW ALTERED.—Parol evidence is inadmissible to show that a bill of sale included property not described therein. Where a bill of sale is defective in such particular, it can only be altered by a direct proceeding in chancery for the purpose of reforming it.

*Same case, 6 Cal. 175; 7 Cal. 282.

1. Distinguished *Burke v. Carruthers*, 31 Cal. 471.

2. Approved, parol evidence not admissible to vary written instrument, *Doggs v. Merced M. Co.*, 14 Cal. 307.

PLEADING—AFFIRMATIVE MATTER IN ANSWER TO BE PROVED.—Affirmative matter alleged by defendant in his answer, must be proved.

APPEAL from the District Court of the Fourth Judicial District, County of San Francisco.

The facts involved in this appeal are sufficiently explained in the opinion of the Court, taken in connection with those stated in the former report of this case, to be found in 7 Cal. 282.

D. O. Shattuck and E. L. B. Brooks, for Appellant.

N. K. Osborn, for Respondent.

BURNETT, J., delivered the opinion of the Court—TERRY, J., concurring.

This case was before this Court at the last January Term, when the judgment of the Court below was reversed, and that Court "directed to render judgment for the plaintiff for the amount claimed in the complaint, and not denied in the answer." The amount claimed in the complaint was six hundred and seventy-six dollars and sixty-seven cents, and seventy-seven dollars and five cents interest. Upon receiving the *remittitur*, the Superior Court of San Francisco rendered judgment for the sum of seven hundred and ninety-five dollars, being the sum claimed, and interest at ten per cent. per annum, from July 1, 1855, to the date of the judgment. From this judgment the defendant appeals.

The present learned counsel of the defendant, who was not the original attorney who drew up the answer, insists that the Superior Court mistook the opinion of this Court, "because the very foundation of plaintiff's claim is denied, to-wit: that the plaintiff was the owner of the house." He elsewhere assumes that the answer presents two issues:

1. That the plaintiff was not the owner of the house.
2. That he had received full pay for its use.

The plaintiff alleges in his complaint that he, "on the first day of July, 1855, and for five months prior thereto, was the owner of a certain house, etc.," and that the defendant pretends to meet this allegation by denying "that the said plaintiff from the first day of July, 1855, and for a long time thereafter, to-wit: five months, was the owner," of the premises mentioned. This frivolous and evasive answer seems to have misled the present counsel of defendant, and hence his brief is predicated upon a mistaken state of the pleadings. The complaint having been verified by affidavit, and there being no denial either of the ownership of the house during the period stated, or of the occupancy of the premises by the defendant, there was, in fact, no denial of the amount claimed for the use and occupation of the premises.

The allegation that plaintiff had "disposed of his claim for any and all rents to Cohen," and also the general allegation of payment, were simply affirmative statements, which the defend-

ant was bound to prove. The only proof offered was that which was decided by this Court to have been illegal. There being, then, no evidence to sustain the affirmative allegations of the defense, the plaintiff was entitled to judgment. We could not see how the defendant could strengthen his defense, and, therefore, could not see any necessity for a new trial. If, however, the defendant had independent proof of payment, which he failed to introduce on the former trial, he should have applied for a modification of the judgment, within the ten days allowed by the rules of this Court. Upon a proper showing that such evidence existed, and a good excuse for not having introduced it, this Court would have modified the judgment, and allowed a new trial in the Court below.

We are also asked to review our former decision, and to correct the same, if found erroneous. It would only be where there was undoubted error, that we could review and correct a former decision. But we can see no error in that decision. Cohen was treated as a purchaser, and not as the agent of defendant. Not only was Cohen permitted by defendant to hold himself out to plaintiff as acting for himself, but the defendant, in his answer, alleges a sale of the rents from plaintiff to Cohen. As a purchaser, Cohen could not make payment as the agent of defendant. Treating Cohen as a purchaser, the question was, simply, what did he purchase? The writings stated so much, and the parol proof stated that much, and something in addition. The question was, not whether the consideration could be inquired into, but whether the sale included a matter not described in the bill of sale. Parol evidence could not add to the writing a description of property not embraced in it. If the bill of sale was defective in this particular, the party should have instituted a direct proceeding to reform the instrument. It was too late to reform the same upon the trial. The plaintiff could not be expected to meet such a state of proof, except in a direct proceeding for that explicit purpose. And it is too late to call upon this Court now to open the case, so as to permit the institution of such a proceeding. If the amount was very large, and the circumstances peculiar, this Court might, perhaps, permit it to be done.

There is one question, however, in regard to which we think the counsel for the defendant is correct. The [33] judgment of the Court below was for the amount claimed, and also for interest. The statute of April 13, 1850, (Comp. Law, 109,) allows interest in certain specified cases; upon examination of the statute, it will be found that the present action for use and occupation is not included in the cases mentioned.

The judgment of the Court below is, therefore, reversed, with costs, and that Court will render judgment for plaintiff for six hundred and seventy-six dollars and sixty-seven cents, and his costs; the plaintiff, however, paying the costs occasioned by this appeal.

CUNNINGHAM ET AL v. HOPKINS.

UNDERTAKING ON APPEAL, AMENDMENT OF.—Where a motion is made in the District Court to dismiss an appeal, on the ground that the undertaking filed is insufficient, and before the determination thereof the other party offers to amend his undertaking: *Held*, that it is error to refuse to allow him so to do.

APPEAL from the County Court of Amador County.

Action to recover a mining-claim by plaintiffs, Cunningham and Mears, before a justice of the peace. Judgment for defendant. Plaintiffs appeal to the County Court. Defendant moves for a dismissal of the appeal, on the ground that the undertaking of plaintiffs is bad. Plaintiffs then offer to file a good one. Afterward, the Court refuses permission, and enters judgment of dismissal, from which plaintiffs appeal to this Court.

Robinson, Beatty & Botts, for Appellants

Smith & Hardy, for Respondent.

BURNETT, J., delivered the opinion of the Court—MURRAY, C. J., concurring.

The plaintiffs brought this action before a justice of the peace, when judgment was given against them for costs, from which they appealed to the County Court. The appeal was dismissed upon the ground that the undertaking was insufficient, and plaintiff appealed to this Court.

In the late case of *Bryan v. Berry* (6 Cal. 394), we held that “where a mere defective undertaking has been *bona fide* given, and the appellant will file a good one before the case is submitted, this Court will allow him to do so.”

In this case, the plaintiffs offered to amend the bond before the motion to dismiss was determined, and they should have been permitted to do so.

Judgment reversed, and cause remanded.

[34] *RICKETT ET AL v. JOHNSON ET AL.

INJUNCTION, NOT TO RESTRAIN COURTS OF CO-ORDINATE JURISDICTION.—One District Court cannot, by injunction, restrain the execution of the orders or decrees of another Court of co-ordinate jurisdiction.

IDEM.—RELIEF, WHERE OBTAINABLE.—The Court in which the objectionable order or decree exists, is the one to apply to for relief.

APPEAL from the Superior Court of the City of San Francisco.

The defendant, Johnson, filed his complaint in the Fourth District Court, to enforce the specific performance of an agreement executed by defendant John H. Rickett, for the conveyance of land. The suit was defended by Rickett, and a decree ren-

1. Cited *Resalk v. Kraemer*, post 71; *Chipman v. Hibbard*, post 271; *Phelan v. Smith*, post 521; *Gorham v. Toomey*, 9 Cal. 77; *Uhlfelder v. Levy*, Id. 614; *Pizley v. Huggins*, 15 Cal. 134; *Crowley v. Davis*, 37 Cal. 269; *De Godey v. Godey*, 39 Cal. 162; *Platto v. Deuster*, 22 Wis. 496.

dered, requiring the conveyance to be executed. Before the execution of the deed, Rickett and wife filed their complaint in the Superior Court, alleging a right of homestead in the premises, and fraud in obtaining the agreement, and praying for an injunction, restraining the execution of the decree of the Fourth District Court. The injunction was granted, and the defendants appealed from the order.

Robert F. Morrison, for Appellants.

This is an appeal from an order of the Superior Court of the City of San Francisco, enjoining a decree of the Fourth District Court of California, and is also an appeal from an order of the said Superior Court, refusing to dissolve the injunction granted in said cause.

The appellant relies on the following points and authorities in support of his appeal:

1. Proceedings in a Court of Chancery will not be restrained by injunction upon the original bill—the course is to apply by petition in the original suit. (*Smith v. American Life Ins. Co.* 1 Clarke. 307; *Lane v. Clarke*, Id. 309; 2 Paige Ch. 26; 1 Hoff. Ch. 89; 1 Barb. Ch. 619.)

2. No Court in this State can rightfully enjoin a defendant from proceeding in a suit in another Court of the State having equal power to grant the relief sought by the complaint. (*Grant v. Quick*, 5 Sand. 612.)

Pixley & Smith, and *L. Aldrich*, for Respondents.

There is no question here of the conclusiveness of the proceedings in the District Court. These proceedings are not pleaded in bar, nor are they brought before the Court by affidavit. The only manner in which they are brought before the Court at all, is, as they are presented in the bill, and there they are accompanied by averments which must be taken with them; and, for the purposes of this appeal, considered as true.

We consider *it too clear to admit of any controversy, [35] that the averments of the bill, taken together and considered as true, as they must be for the purpose of the appeal, make out a case for an injunction, unless some rule of practice, or of judicial comity, or of jurisdiction, intervene to prevent.

The question upon which this appeal seems mainly to rest, is rather one of practice than of right. It is insisted that this proceeding should have been instituted in the District Court, or that it should rather have been made part of the proceedings, than by petition or otherwise. The Superior Court is a Court of concurrent jurisdiction of the subject-matter of both suits. It will not be contended that the Superior Court, if it had remained in existence, could not have gone on to a final adjudication of the questions involved in this suit. If it had the right to go on and adjudicate upon the rights of the parties, and to determine the conclusiveness and effect of the proceedings in the District Court as to them, by what authority is it to be deprived of the remedial process provided by law for the protection of the rights of

the parties litigant during the pendency of the litigation. This was not a case for a bill of review; because the plaintiffs did not seek the examination, alteration or modification of the decree of the District Court for errors apparent upon its face, and because the wife was not a party to the proceedings in the District Court. Nor was this proceeding based upon the discovery of new matters of defense against the proceeding in the District Court, which might have been used therein if the respondent Rickett had had knowledge of them.

Unless the Court shall decide that the Superior Court should not have entertained jurisdiction of the cause, but should have dismissed the bill, we submit that the right to the injunction is clear.

BURNETT, J., after stating the facts, delivered the opinion of the Court—MURRAY, C. J., concurring.

The only question which it becomes necessary to determine is, whether one District Court, under our system, can issue the writ of injunction, restraining the execution of the orders, or the carrying into effect the decrees, of another Court of co-ordinate jurisdiction.

This question was settled by the unanimous opinion of the Superior Court of New York, in the case of *Grant v. Quick*, 5 Sand. 612. In that case, Justice Duer, in delivering the opinion of the Court, uses this language:

"The only ground upon which the Court of Chancery formerly acted in granting injunctions, in cases like the present, was the inability of a Court of Law, in which the suit was pending, to grant the necessary relief; but as, since the code, the jurisdiction of all our Courts is equitable as well as legal, or more properly, *as the distinction between legal and equitable, except in reference to the nature of the relief demanded, is now abolished, the reasons by which the exercise of a power, always invidious and frequently abused, could alone be justified, have ceased to exist, and have left a case to which the maxim emphatically applies, that *cessante ratione, cessat etiam lex*."

In the present case, the plaintiffs could obtain the most ample relief in the Court whose proceedings they wished to restrain; and there was no reason for seeking another tribunal, possessing only the same powers. Under our system of pleading, all they had to do was simply to allege the facts constituting their cause of action, in their natural order, and pray for the relief they desired. If they wished a stay of proceedings, they should have petitioned the Court for it, upon due notice to the opposite parties, and not have prayed for an injunction. An order to stay proceedings was all they required. (*Smith v. Am. Life & F. Ins. Co.*, 1 Clarke, Ch. 307, 309; *Lane v. Clark*, Id. 316; *Barbour's C. Pr.* 619.) As to the merits of the complaint, we express no opinion.

Judgment reversed, and the Court below will enter an order dissolving the injunction.

WHIPLEY v. DEWEY *et al.*

LANDLORD AND TENANT—TENANTS, WHEN MAY REMOVE BUILDINGS.—Tenants have a right to remove buildings erected by them, at any time before the expiration of their leases.

IDEM—WHEN MAY NOT.—Tenants have no right to remove buildings erected by them, after a forfeiture, or re-entry, for covenant broken.

IDEM—SURRENDER OR FORFEITURE, EFFECT OF.—Where a landlord agreed to allow his tenant a reasonable time, after the expiration of his lease, to remove his buildings, and the tenant surrendered or forfeited his lease, before the expiration thereof, the intention of the parties must be confined to its legal expiration, and not to the wrongful act of the lessee, in terminating it, and the lessee can claim no rights under the contract.

IDEM.—There is no moral obligation, under such circumstances, sufficient as a consideration, to support a subsequent promise of the landlord, to allow the tenant to remove his buildings.

APPEAL from the District Court of the Eleventh Judicial District, County of Yolo.

The record in this case shows that some time in 1850, Whippley, and several others, leased a house and lot from the defendants; that after the plaintiff had entered into possession, he obtained permission from Dewey, one of the defendants, to erect two small wooden tenements upon the lot, with the privilege of removing them. The lease was terminated before the time specified (how, it does not appear), the plaintiff alleging, in his declaration, that the defendant re-entered and took possession. Some time afterwards, Dewey & Smith offered the lot for sale, *at auction. The plaintiff notified the defendant [37] Dewey, that he would forbid the sale, as he claimed the two houses he had erected on the lot. The defendant Dewey agreed that if the plaintiff would not interfere with the sale, he would pay him the value of the improvements. No sale was made of the property, and the houses were consumed by fire some time afterwards. Whippley now sues Dewey & Smith for the value of the houses.

The Court below entered judgment for plaintiffs. Defendants appealed.

Robinson, Beatty & Botts, for Appellants.

The respondent says, in his complaint, that the lease from Dewey & Smith, to plaintiff and others, was terminated by Dewey & Smith, before the expiration of the time for which it was originally given. He does not say it was terminated by the agreement of both parties to the suit; neither does he charge Dewey & Smith with illegally terminating the same, by an illegal or forcible ouster of their tenants.

Therefore, we may infer that the tenant did some acts which the landlords had a legal right to treat as a forfeiture, on the part of the tenant, and that they did so treat it.

We come to this conclusion, for two reason: First, because we cannot see any mode, in which the landlords alone could terminate a lease, before the time fixed in the lease for its termination; Second, any pleading must be construed most strongly against the party pleading. (See 1 Chitty, 217.)

If the right to remove improvements ever existed, (which we deny, at least as far as regards Smith,) it ceased to exist as soon as the lease became forfeited, or otherwise legally terminated. (See *Preston v. Bigs*, 16 V. 124; *B. v. St. John*, 16 Conn. 322; *Sheppard v. Spalding*, 4 Met. 416.)

There is a principle of the common law, that a tenant may, for the purposes of trade and manufactures, erect on rented premises, temporary improvements and fixtures, which he may again remove; provided always, said removal is made at or before the termination of his lease.

Of late years, the Courts of some of the American States have shown a disposition to extend the same privilege to all tenants, that is, to allow them to remove the improvements which they themselves put on, if said removal is made before the termination of the lease.

The respondent seems only to rely on the promise of Dewey, as the foundation of his right to sustain this action. A promise, to sustain an action, must be made on some good and valuable consideration.

Smith & Hardy, for Respondent.

"If the tenant is prevented from removing the fixtures [38] by any *agreement with the landlord, he is not presumed to have abandoned his right to remove." (Taylor's Landlord and Tenant, Sec. 552; *Hallen v. Runday*, 3 Tyrwhit, 959.)

It is plainly shown, that for some time a contest was going on, the respondent all the while striving to remove his fixtures, and was all the time deterred by the act and promises of the appellants.

But if, in fact, the appellants had no legal right to remove the improvements, there was a moral right, and such a right is a sufficient consideration to support a promise, under these circumstances.

In *Lee v. Muggeridge*, 5 Taunt. 36, Lord MANSFIELD said: "It has long been established, that where a person is bound morally and conscientiously to pay a debt, though not legally bound, a subsequent promise will give a right of action."

"Where two parties are contending, and one releases his pretensions to the other, there can be no color to set this release aside, because the man who made it had the right." (Id.; *Bennett v. Paine*, 5 Watts, 259; *Moore v. Fitzwater*, 2 Rand. 442.)

MURRAY, C. J., after stating the facts, delivered the opinion of the Court—BURNETT, J., concurring.

The first point which I propose to examine is the character of the agreement between the plaintiff and Dewey, concerning the erection and removal of the houses.

It is well settled by modern decisions, that a tenant may remove buildings erected by him at any time before the expiration of the lease, and the deduction sought to be made from this proposition is, that the agreement between the parties (they

both being aware of the law on this subject) was understood to confer upon the plaintiff something more than his strict legal right. In other words, being allowed by the law of his contract, to remove the buildings at any time before the expiration of his term, he sought and obtained the further privilege of removing them after the expiration of his lease; it would have been useless to have solicited as a favor what he already possessed as a right, and the only inference to be drawn from the agreement is, that he was to be allowed a reasonable time after the expiration of his lease to remove his buildings.

This is carrying the doctrine of presumption as far at least, as it would be safe to go, and if we are allowed to indulge in presumptions or inferences, the most natural one would be, that at the date of this contract, the parties imperfectly understood their rights, and therefore stipulated for precisely the same privileges which the law of the contract would have afforded. Suppose, however, the understanding to have been that Whiple should have a reasonable time after the expiration of his term, to remove his buildings, it must be borne in mind [39] that the moving cause or consideration of this agreement, was the lease under which the plaintiff entered. It appears from the declaration, that before the lease expired the defendants re-entered and took possession. Whether this was by agreement, or on account of a forfeiture for non-payment, or some other cause, does not appear. The pleadings must be taken most strongly against the pleader, and the inference is irresistible, that the defendants forfeited their lease.

It is well settled that a tenant cannot remove erections, made by him on the premises, after a forfeiture or re-entry for covenant broken. Admitting that the defendant had agreed to allow the plaintiff to remove, after expiration of the lease, the intention of the parties must be confined to the legal expiration thereof, by its own limitation, and not by the wrongful act of lessees terminating the same. The consideration of the contract, as before remarked, was the lease, and the plaintiff, having voluntarily or illegally terminated the same, ought not to be allowed to set up a right under the contract.

But it is contended, admitting the plaintiff had no right to remove after the expiration of the lease, he still had a moral right to the improvements, or the value thereof, and that this is a sufficient consideration to support a subsequent promise.

It is difficult to see how there was any moral obligation on the part of the defendants, to pay for the plaintiff's improvements, particularly after he had broken his covenant, and forfeited his lease. Besides, it is extremely doubtful from the testimony, whether there ever was a sale or an agreement to pay the plaintiff, except on condition that he would not interfere with the proposed sale of the lot. In the event of a sale he would have been entitled to payment, but as there was no sale, there was no consideration to support the promise.

Judgment reversed, and cause remanded.

VAUGHN v. ENGLISH.

1 OFFICERS OF DEPARTMENTS.—The clerks of the different departments are officers within the meaning of section six of the Act of April 21st, 1856, reducing the salaries of officers, etc.

APPEAL from the District Court of the Sixth Judicial District.

The respondent was, in January, 1856, appointed clerk in the office of Secretary of State, which position he still holds. At the time of his appointment, his salary was fixed by law at [40] two hun-*dred and seventy dollars per month, which sum he continued to receive up to the 31st of March, 1857.

In July, 1856, the Controller of State, in payment of his salary for the month of April, issued a warrant upon the Treasurer in favor of the respondent, for the sum of two hundred and seventy dollars. This warrant the Treasurer refused to pay, alleging as a reason that respondent's salary was reduced by the Act of April, 1856, to two hundred dollars per month.

Petitioner sued out a writ of *mandamus* against the defendant, as State Treasurer, and on the hearing thereof it was made peremptory against defendant, from which judgment he appealed.

J. L. English, Appellant, in person.

Under the provisions of the first section of the Act of April 21, 1856 (Acts of 1856, p. 224), the plaintiff is only entitled to two hundred dollars per month, unless he is-exempted from its operation.

The plaintiff contends that this exemption is to be found in the sixth section of the Act; but I conceive that the plaintiff being a clerk in the office of Secretary of State, is not an "incumbent in office," or an "officer," within the meaning of the sixth section. Even if a clerk in one of the offices can be held to be an "officer," which I cannot by any means admit, yet having no term of office, he is not within that sixth section. The sixth section exempts from the operation of the Act only those officers who were elected or appointed for a given term, providing that "the incumbents now in office shall, for their present term, receive," etc. Now, a clerk has, by law, no term of office. He holds his appointment merely at the pleasure of the head of the department. He can be dismissed at any time. He may be discharged to-day, and be re-employed to-morrow. And under said re-employment, could he possibly lay claim to more than two hundred dollars per month.

Again, what is the term of office of a clerk? If it is as long as he may remain in the office, he might be retained by successive heads of departments for years, without being discharged, and then under the construction for which plaintiff claims, he could demand and receive the old rate of pay, notwithstanding

1. Cited *United States v. Hartwell*, 6 Wall. 393.

the provisions of the first section. A clerk has no term of office, and having none, he is not within the exemption of the sixth section.

E. W. F. Sloan, for Respondent.

For the month of April, 1857, the Controller drew his warrant, in due form, in favor of the respondent, on the appellant, in the sum of two hundred and seventy dollars.

This was duly presented to the appellant for payment, and it being admitted that there were funds in the treasury, payment of the warrant was refused, alone on the [41] ground that the respondent was entitled to receive but two hundred dollars per month, under the existing law.

The Act referred to is entitled "an Act to reduce and establish the salaries of officers and pay of members of the Legislature." (Stat. 1856, p. 224.)

After prescribing the salaries to be received by the various officers therein named, it is further provided in section first as follows:

"To each clerk allowed by law in the offices of Secretary of State, Controller, and Treasurer of State, two hundred dollars per month."

But it also provides in section sixth, as follows:

"This Act shall not be held to reduce the salary or pay of any of the incumbents now in office, who shall for their present term receive compensation at the rate prescribed by law, but shall apply to every such officer hereinafter elected or appointed."

The appellant contends that a clerk in the office of Secretary of State, is not "an officer" or "incumbent in office," within the meaning of the Act, and is, therefore, not exempt from its general operation, by the provisions of the sixth section.

I submit that this position of the appellant is wholly untenable. The law itself denominates the clerk an "officer."

By the Act of March 15, 1853, the Controller is authorized to appoint an additional clerk for his department, "who shall hold his office during the pleasure of the Controller."

It further provides that the Treasurer shall have power to appoint an additional clerk, etc., and that these clerks shall receive for their services two hundred and seventy dollars per month. (Stat. of 1853, pp. 43, 44, secs. 1, 2, 3.)

The legal meaning of an office has been judicially defined to be "an employment on behalf of the government in any station or public trust, not merely transient, occasional, or incidental." (20 Johns. 493.)

TERRY, J., delivered the opinion of the Court—MURRAY, C. J., concurring.

The sixth section of the Act of April, 1856, provides: "This Act shall not be held to reduce the salary or pay of any of the incumbents now in office, who shall for their present term re-

ceive compensation at the rates now prescribed by law, but shall apply to every such officer hereafter elected or appointed."

The only question presented by the record is, whether a clerk in one of the departments is an officer within the meaning of this section.

The term officer, in its common acceptation, is sufficiently comprehensive to include all persons in any public station or employment conferred by government.

[42] *"Officers are public or private, and it is said every man is a public officer, who hath any duty concerning the public, and he is not the less a public officer, where his authority is confined to narrow limits, because it is the duty of his office and the nature of that duty which makes him a public officer, and not the extent of his authority." (4 Jacobs' Law Dic. 433.)

The respondent was appointed by government; the duties which he is to perform concern the public, and he is paid out of the public treasury; he is therefore clearly a public officer.

The terms of the Act of April, 1856, we think show conclusively that the Legislature intended the term "office" to include all persons employed by the government.

The Act is entitled "an Act to reduce and fix salaries of officers and members of the Legislature," and the clerks of the different departments are included in the list of officers whose salaries are fixed by the Act.

The objection that such clerks have no definite term of office is not tenable; they are appointed for the term of the officer making the appointment, subject to the power of removal.

Judgment of the Court below is affirmed, with costs.

PEOPLE v. COHEN.

¹CONVERSION BY BAILEE.—All conversions of money or property by a bailee, are not "*ipso facto* unlawful, or felonious, under our statute. The word 'bailee,' under our statute, must be construed in a limited sense, as designating 'bailees' to keep transport and deliver."

²IDEM.—INDICTMENTS, WHAT SHOULD SET FORTH.—Indictments under the statute against "bailees" should distinctly set forth the character of the bailment, the mode of conversion, the description of the property, and its value.

³IDEM.—WHEN INSUFFICIENT.—An indictment which charges the defendant with converting money, goods, and chattles, of the value of four hundred thousand dollars, without any particular specification of the different articles, is bad.

APPEAL from the Court of Sessions of San Francisco County.

The defendant, A. A. Cohen, demurred to the following indictment against him, which being overruled, the defendant appealed from the order overruling the demurrer.

1. Disapproved *People v. Foggi*, 19 Cal. 601.

2. Approved *People v. Peterson*, 9 Cal. 315.

3. Commented on and restricted, *People v. Winkler*, 9 Cal. 236; *People v. Green*, 15 Cal. 513.

"The grand jurors within and for the body of the county of San Francisco, and State of California, now here in the Court of Sessions within and for the said county, duly empaneled and sworn at the February Term of said Court, began and holden at the city of San Francisco, county and State aforesaid, on the first Monday of February, A. D. one thousand eight hundred and fifty-six, on their oath, present:

"That Alfred A. Cohen, of the city, county and State aforesaid, on the first day of July, A. D. one thousand eight hundred and *fifty-five, at the said city and county, be- [43] ing then and there the bailee of the sum of four hundred thousand dollars, the moneys, goods, and chattels, of Adams & Co., being composed of the following persons, to wit: Alvin Adams, Isaiah C. Woods, and Daniel H. Haskell, did then and there, feloniously and willfully, convert the said four hundred thousand dollars to his own use, with intent then and there to steal the same, contrary to the form, force, and effect, of the statute, in such cases made and provided, and against the peace and dignity of the people of the State of California."

J. A. McDougall, for Appellant.

W. T. Wallace, Attorney-General, for Respondent.

MURRAY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

Indictment for grand larceny, as bailee, demurrer to the indictment overruled, from which defendant appeals.

The indictment charges that "A. A. Cohen, being bailee of four hundred thousand dollars, the moneys, goods, and chattels, of Adams & Co., did feloniously and willfully convert the same to his own use, with the intent to steal the same."

The offense is created by special statute, and it is insisted that it is not properly charged in the indictment. Bailment is defined by Judge STORY "to be the delivery of a thing in trust for some special object or purpose, upon a contract, express or implied, to conform to the object or purpose of the trust."

The objects of bailment may be as various as the transactions of men; they are made for the purpose of sale, hire, safe-keeping, etc. In some cases, in fact, in a large majority of transactions, they are made for the purpose of a disposition or conversion of the property. As, for example, bailments by commission merchants or factors, in which a conversion is the very object of the trust. If in such cases, after a sale or conversion of the property, the agent or factor should lose or misapply the proceeds, it is apprehended that an indictment would not lie against him, under the statute concerning bailees, although he might probably be indicted for embezzlement, if the Legislature thought proper to make that a penal offense.

It may then be safely assumed that all conversions of money, or property, by a bailee, are not *ipso facto* unlawful or felonious under our statute. A proper understanding of the word "bail-

ment," justifies us in the conclusion, that the Legislature intended to use the word in a limited sense, as designating bailees to keep, to transfer, or to deliver. If such is the case, then the character of the bailment, and the mode of conversion should be distinctly set forth in the indictment. The cases generally *arise upon contracts, and the circumstances constituting the offense, can be ascertained with far more certainty than those attending ordinary crimes and misdemeanors.

There is another objection to the indictment, which is fatal. It does not state what was the property converted; the language is, "four hundred thousand dollars, moneys, goods and chattels." How can the defendant know what he is charged with? or how prepare for his defense? how much money, what goods, and what chattels? These facts must, to a certain extent, be within the knowledge of the prosecution. Besides this, the allegation that they were of the value of, or the amount of four hundred thousand dollars, is insufficient to give the Court jurisdiction. The Court cannot know that by four hundred thousand dollars, was meant so much lawful money of the United States. For aught we may know, it is the currency of some other State, or nation, and not sufficient in amount to charge the defendant, under our statute, with grand or petit larceny.

For these reasons, the judgment is reversed.

MEYER ET AL. v. KOHLMAN ET AL.

INSOLVENT ACT, APPLICATIONS UNDER, VOID.—A joint application of two partners for the benefit of the Insolvent Act is void, there being no authority for such applications in the Act.

IDEM.—SCHEDULE.—A schedule attached to such a petition, showing a surrender of all the joint property of the partners, is not a compliance with the Act, which requires a surrender of all the property of the insolvent.

¹ **IDEM.—DISCHARGE, WHEN A BAR.**—A discharge under the Insolvent Act, to be a bar to actions on indebtedness mentioned in the petitioner's schedule, must be in strict conformity with the various provisions of the law, otherwise it is void.

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

This case is sufficiently stated in the opinion of the Court, except that the Court below held the insolvency proceedings a bar to this suit, and rendered judgment for defendants. Plaintiffs moved for a new trial, which being denied, they appealed.

H. J. Labatt, for Appellants.

The insolvent Act, being in the nature of a special proceeding, and contrary to the common law, all and each of its provisions must be strictly complied with to make it of full force

1. Cited *McDonald v. Kats*, 31 Cal. 109.

and effect. Such has been the sound and efficient rule adopted by this Court on more than one occasion, and become the settled practice.

That the insolvency petition of the co-partners Jacob and Solomon Kohlman, is made out jointly and not separately, and as such is unauthorized by the statute.

In examining the language of the statute, we are unable to *determine in what manner any authority is given [45] for a joint petition. The whole Act speaks of the single person, and requires that each petition shall be filed separately. The reason for this is obvious. The petition and schedule should precede the oath, and the schedule of one cannot be sworn to by the other. The oath provides for one individual, and how can one insolvent swear that the other has done what the oath requires of him to depose and say? Did the oath in this particular case read that each for himself truly and solemnly swears, etc., it might assume some tenability; but for a joint oath, and not a several oath, it opens the door to fraud and deception, and such as cannot be tolerated in insolvency.

That there is no schedule annexed to the petition after reciting the circumstances, which compelled them to surrender their property to their creditors. (Comp. Laws, 314, secs. 2, 3.)

Section two provides that the insolvent shall briefly state in his petition the circumstances, and shall conclude his petition with a prayer to make a cession of his estate. Section three provides that he shall annex to his petition his schedule, and states what the schedule should contain.

Now the document on record is neither a brief statement, nor a schedule. It contains a statement, but after the conclusion of the prayer, we find no schedule, neither annexed nor subjoined. It is but the circumstances, as required in section two. Note the language and then determine. After stating that the Court has jurisdiction, they say: "And that their failure has been for the reasons hereafter stated, to wit: indebtedness," etc. Is not that circumstances; and what there determines it a schedule?

Again: "Second, as to their failure, they make the following statement," merely continuing to show circumstances, but not a schedule.

Then follows the prayer, but there is no schedule in conformity with the provisions of the statute.

The prayer must conclude the petition, and to the petition must be annexed the schedule, and a non-observance of this will be fatal and render all subsequent proceedings void for want of jurisdiction.

Proceedings in the nature of an insolvent's discharge may be ruled out as void, if there was a want of jurisdiction in the officer granting it. (*Small v. Wheaton*, 2 Abb. 175; *Staunton v. Ellis*, 16 Barb. 319.)

The general doctrine is not questioned, that where there is a want of jurisdiction in the officer to grant the discharge of the insolvent, the defect is available at all times, in all places, and

by any party prejudiced thereby. (*Small v. Wheaton*, 2 Abb. 175; *Muzzy v. Whitney*, 10 Johns. 225; *Miller v. Brinckerhoff*, 4 Den. 120; *Staples v. Fairchild*, 3 Comst. 41; *Van Alstyne v. Erwine*, 1 Kern. 331; *In re Hurd*, 9 Wend. 465.)

[46] **Crockett & Page*, and *P. L. Edwards*, for Respondents.

In this case, no new principle is involved which is not fully covered by the decision of this Court, in the case of *Kohlman v. Wright*, decided at the July Term, 1856.

In that case, the indentical discharge of the insolvent, now in controversy, was under review, and it was objected that the discharge was void, because the petition was sworn to before the clerk, instead of the Judge.

The Court, however, overruled the objection, and held the discharge good, on the ground that the error of making the oath before the clerk, instead of the Judge, was only an irregularity, to be corrected on appeal, and does not affect the question of jurisdiction.

The Court had jurisdiction over the cause; but a failure of the petitioner to comply with the merely directory parts of the act, cannot affect the question of jurisdiction, though it might furnish grounds of reversal on appeal.

If the Court had jurisdiction of the subject-matter, the person, and the relief sought, any mere irregularity in the proceedings will not invalidate the discharge.

On this point, the following authorities are deemed conclusive:

Betts v. Bagley, 12 Pick. 572; *Taylor v. Williams*, 20 Johns. 21; *Stanton v. Ellis*, 16 Barb. 321; *Cole v. Stafford*, 1 Caines, 249; *Service v. Hermance*, 1 Johns. 91, 300; *Cunningham v. Bucklin*, 8 Cow. 178; *In re Hurst*, 7 Wend. 239; *Jenks v. Stebbins*, 11 Johns. 224, 441.

It is eminently proper that the application of the members of an insolvent firm should be joint, and not several.

The assets of the firm are to be applied to the payment of firm debts, and the individual assets to the individual debts.

If the applications were several, and not joint, each petitioner might have a separate assignee; and of these several assignees, which of them is to administer the assets of the firm.

It is evident, endless disputes and confusion would arise, and, as there is nothing in the statute in conflict with this view of the case, and as it is obviously most convenient in practice, a joint application is not only allowable, but it is, in fact, the only proper mode of proceeding.

TERRY, J., delivered the opinion of the Court—BURNETT, J., concurring.

This is an action upon a promissory note. The defendants pleaded in bar to the action a discharge from their debts by the judgment of the District Court of Nevada County, under the in-

solvent laws of the State, and the question involved in the record is as to the validity of this discharge.

It appears from the record of the proceedings in insolvency, that the defendants, who were partners, made a joint application for the benefit of the act; that the schedule, [47] affidavits, and other papers, were filed as the joint act of the partners. In the case of *Cohen v. Barrett* (5 Cal. 195,) it was held that an application under the Insolvent Law was not *stricti juris*, a proceeding either at law or equity, but a special remedy, created by statute, and that, as to such proceedings, the District Courts are inferior Courts, and must pursue the statute strictly; that, in such cases, the District Court must first ascertain that the person, the subject-matter, and the relief sought, are within the statute, before its jurisdiction will attach; in other words, in order to vest the Court with jurisdiction, the petitioner must show, on the face of his application, such a state of facts as will entitle him to a discharge.

In the case under consideration, the application was wholly insufficient.

1. Because it was made in the joint name of the partners, for which there is no authority in the act.

2. Because it does not show a surrender on the part of the defendants, of all the property owned by them, or either of them. The petition, schedule, and affidavit, show a surrender of joint property only, and, for aught that appeared, each may have been in possession of individual property, more than sufficient to satisfy the demands against them.

It follows that the proceedings in bankruptcy, being without jurisdiction, and void, constitute no bar to the action.

Judgment reversed, and cause remanded.

FRANK v. BRADY.

PROMISSORY NOTE—INDORSERS' LIABILITY.—Where F sued on a note which had two endorsements, signed by the payee; the first a receipt from F for the amount due; the second, in the words "without recourse to me:" Held, that there was no presumption that the endorsements were made at different times, or that the payment was a voluntary unconditional payment.

IDEM.—In such case, it was proper for the Court to instruct the jury, as a matter of law, to find for the plaintiff, in the absence of evidence showing a legal or moral obligation on the part of plaintiff to pay the debt of the defendant.

1 APPEAL—ORDERS NOT REVIEWABLE.—This Court will not review an order denying a continuance, except where there has been an abuse of the discretion vested in them by the Court below.

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

Frank sued the defendant in the Court below, and on the trial thereof, based his case on the following promissory note:

"On demand, I promise to pay Mayer Schultz or his agent, H. L. Kohn, one thousand dollars, with interest at the rate of three per cent. per month. "LEWIS BRADY.

"SAN FRANCISCO, August 23, 1852."

[48] *Across the back of the said note were two several writings, viz.:

"SEPTEMBER 25TH, 1852.

"Rec'd the payment of the within sum, and thirty-three dollars interest, by the hands of Mr. Isaac Frank.

"MAYER SCHULTZ, by
"H. L. KOHN, Agent."

"Without recourse to me.

"MAYER SCHULTZ, by H. L. KOHN, Agent."

Plaintiff proved the various signatures to the note, and then rested his case. There being no testimony offered by the defense, the Court, as a matter of law, instructed the jury that they should find for the plaintiff. They found accordingly. Judgment for plaintiff. Defendant moved for a new trial, which being denied, he appealed.

C. H. S. Williams, for Appellant.

B. S. Brooks, for Respondent.

MURRAY, C. J., delivered the opinion of the Court—TERRY, J., concurring.

This was a suit upon a promissory note.

The appellant assigns two errors; 1st, The refusal of the Court below to grant a continuance; and 2d, Misdirection of the jury by the Court.

The affidavit for a continuance does not, in our opinion, show sufficient diligence on the part of the defendant. This was the second trial of the case. The witness had testified on the former trial, and was in the city of San Francisco until a few days before the second trial. The defendant relied on his promise to attend, and took no pains to secure his testimony, by deposition or otherwise. It is true, that the affidavit states that he caused a subpoena to be issued, which was not served; but it does not appear whether it was issued before or after the departure of the witness, and the inference, from all the facts and circumstances stated, is, that it was issued after the witness had left the jurisdiction of the Court. The refusal to grant a continuance under these circumstances was not such an abuse of discretion as to call for the interposition of this Court.

Upon the back of the note sued on there was the following endorsement: "September 25th, 1852. Rec'd the payment of the within sum, and thirty-three dollars interest, by the hands of Mr. Isaac Frank. MAYER SCHULTZ, by H. L. KOHN, Agent."

[49] *Without recourse to me. MAYER SCHULTZ, by H. L. KOHN, Agent."

The defendant contends that the endorsements were not made at the same time; that the first was a receipt in full as a payment of the note by Frank; that the debt was extinguished by this payment, and could not be revived by the second endorsement, so as to enable Frank, the holder, to maintain an action upon it. It was contended that these facts could be established by the absent witness, and this was the ground for asking a continuance. On the trial, however, there was no evidence offered to substantiate this defense, and the case went to the jury upon the note and endorsements, the Court instructing them that, as a matter of law, the plaintiff was entitled to recover. It is urged that this instruction was erroneous, for the reason that it was a matter of fact for the jury to determine whether the endorsements were made at the same time, and whether the payment by Frank was intended as an extinguishment or purchase of the note. The holder of a negotiable note is *prima facie* the owner thereof for a valuable consideration.

There is no evidence in this case to warrant the presumption that the endorsements were made at different times, or that the plaintiff voluntarily paid the debt of the defendant. If testimony had been introduced tending to establish a legal or moral obligation on the part of the plaintiff to pay the note, it would have been proper for the Court, in view of these circumstances, to have left the jury to determine whether the first endorsement or memorandum upon the note was intended by both parties as a receipt for the payment of the same. In the absence of all testimony, however, I think the two endorsements must be taken together as forming one contract of assignment, and that it never was the intention of the plaintiff to pay unconditionally the debt of the defendant.

Judgment affirmed.

GORDON v. SEARING.

¹ SECONDARY EVIDENCE, WHEN ADMISSIBLE.—Secondary evidence of the contents of a deed or grant is admissible where the possession of the original is traced to the possession of a party not in the State.

TRIAL.—DISCRETIONARY POWERS OF COURT.—The order in which testimony shall be admitted is within the discretionary powers of the Court before whom the case is tried.

APPEAL from the District Court of the Twelfth Judicial District, City and County of San Francisco.

Gordon sued in the Court below in ejectment for the possession of certain premises in the city of San Francisco, and relied, on the trial thereof, upon a grant made by T. M. Leavenworth, *on the 23d of December, 1848, to one George F. [50] Emmons, from whom he derived his title by a series of mesne conveyances.

The original grant was not produced; but as a predicate for

1. Cited *Bagley v. Eaton*, 10 Cal. 148.

the admission of a certified copy of the grant, the plaintiff himself was sworn, who testified that he had inquired of all the agents of Emmons, the original grantee, for the grant, and had also searched their papers for the purpose of finding it, and that he had failed to discover the grant: that Emmons, the original grantee, was then at Rio Janeiro, in South America, and had not been in the State for several years. Plaintiff's counsel then introduced the deposition of T. M. Leavenworth, who testified that he had granted the premises in dispute, on the 23d of December, 1848, to George F. Emmons, who shortly afterwards left the State, and had never returned. On being shown the certified copy, he testified to its correctness, whereupon the Court below held that a sufficient predicate had been laid for the introduction of secondary evidence, and then admitted the certified copy under the exception of the defendant's counsel.

Judgment for plaintiff, and defendant appealed.

Aug. M. Heslep, for Appellant.

Robert F. Morrison, for Respondent.

MURRAY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

The appellant contends that the Court below erred in admitting secondary evidence of the contents of a deed, and that the loss or absence of the original was not sufficiently accounted for. The plaintiff traced the paper to the hands of a person not in the State. This has always been held a sufficient predicate for the admission of secondary evidence, because the party in whose possession the paper is supposed to be, or was last seen, being beyond the jurisdiction of the Court, it has no power to compel his attendance, or the production of the paper.

Another alleged error is the order in which the Court permitted the testimony to be introduced on the trial. This is always a matter of discretion, and the plaintiff having made out his case, it is not regarded as material in what particular order he established the facts by his evidence.

Judgment affirmed.

[51]

*THE PEOPLE v. MARSHALL.

TENANT-IN-COMMON, POWER TO ALIENATE.—One joint-tenant or tenant-in-common of a chattel, cannot dispose of anything more than his own interest therein.

APPEAL from the Court of Sessions of the County of San Francisco.

H. Marshall, for Appellant.

H. H. Byrne, for Respondents.

MURRAY, C. J., delivered the opinion of the Court—TERRY, J., concurring.

The defendant was indicted, and convicted of grand larceny. The offense consisted in taking several head of stock from the possession of one Buchanan, which had been sold to him by Alexander Marshall, a brother of the defendant. The defendant justified the taking, on the ground that he was the owner of the cattle; or, if not the actual owner, that he, together with his three brothers, were the owners thereof in common, and that the sale by Alexander did not divest the interest of the other joint-owners. The testimony is very conflicting, and the brothers having taken sides in this unnatural controversy, seem unscrupulous as to the means employed to bring disgrace upon themselves and family.

It is impossible, from the evidence, to determine whether the property belonged to Alexander or Hugh. Whether it was partnership property, over which each had the power of disposition, or whether it was the joint-property of the four brothers.

Under this state of case, the defendant requested the Court to charge the jury, "That if the four brothers were the joint-owners of the property, the sale thereof by one, without the consent of the others, would not divest their rights of ownership in such property." The refusal of the Court to give this instruction was clearly erroneous. One joint-tenant, or tenant-in-common, of a chattel, cannot dispose of anything more than his own interest therein. In view of the testimony before the Court, this instruction was pertinent, and should have been given.

Judgment reversed, and cause remanded.

GILMAN v. COUNTY OF CONTRA COSTA. [52]

ORDER DEFINED.—An order is the judgment or conclusion of the Court or Judge, upon any motion or proceeding, and includes cases where affirmative relief is granted, or relief denied.

APPEAL FROM ORDER, WHEN.—An appeal will lie from an order refusing to quash an execution.

1 COUNTY, LIABILITY OF.—At common law, an action did not lie against a county; and this was the law of this State, until the 18th of May, 1854. The law passed May 1st, 1854, exempting the property of counties from a forced sale under execution, did not affect the obligation of plaintiff's contract with the county, for it was but an affirmance of the common law.

2 IDEM.—PROPERTY EXEMPT FROM EXECUTION.—An execution levy upon a county's revenues in the hands of the treasurer, is illegal and void.

APPEAL from the District Court of the Seventh Judicial District, County of Contra Costa.

*Same case, 5 Cal. 426; 6 Cal. 676; affirmed *Gilman v. Contra Costa Co.*, 10 Cal. 508.

1. Cited *Placer Co. v. Astin*, post 305; *Watts v. Ormsby Co.*, 1 Nev. 376.

2. Cited *Emery v. Gilman*, 10 Cal. 410.

This is an appeal from an order of the District Court of the Seventh Judicial District, overruling a motion to quash an execution, and discharge a levy. The plaintiff recovered a judgment against the County of Contra Costa, in March, 1856, and in January, 1857, sued out an execution and caused a levy to be made on the court-house, and also on the revenues of the County in the hands of the treasurer.

Sloan & Hartman, for Appellant.

This is an appeal from an order of the District Court of the Seventh Judicial District, for the County of Contra Costa, overruling the motion of the appellant to quash an execution and discharge the levy.

On the 22d of March, 1856, the respondent recovered judgment against the appellant in the sum of twenty thousand four hundred and twenty-seven dollars with interest at five per centum per month.

After establishing his demand against the County of Contra Costa, the respondent made no application to the County authorities to have the same paid or funded; but on the 10th of January, 1857, sued out execution, which he caused to be levied on the court-house of the county, and also upon the revenues of the county in the hands of the treasurer, consisting of the interest fund, school fund, road fund, general and contingent funds.

The former was advertised for sale in the usual manner; and the latter being seized and locked up, are diverted from their legitimate purposes, thus tending to obstruct and suspend the performance of the ordinary public business of the county.

"The Act of May 1st, 1854, was passed after the contract was made with the plaintiff, and *pendente lite*, and does not exempt this property from sale, under this execution."

The view here presented can be fully answered without [53] con-sidering the question, whether it is competent for the Legislature to pass an Act exempting any part of a debtor's property from sale on execution, which was by law, subject to seizure and sale at the time the debt was created. At the time when the respondent's demand against the county of Contra Costa originated, not only were the public property and revenues of the county exempt from seizure on execution, but the county itself was not liable to be sued.

By the common law no action lies against a county.

It was not until the Act of the 11th of May, 1854, was passed, that an action could be maintained against a county in this State.

Ten days prior to the approval of that act, and with the view of preventing any misapprehension in reference to the rights of the party suing, the Act of the 1st of May was passed, declaring that the court-house, jail, public buildings, offices, lot or land, belonging to the county, should be exempted from forced sales. (Statutes of 1854, pp. 38 and 45.)

The Act of the 1st of May, however, was wholly unnecessary. It is only by virtue of express legislation, that either the property of a county, or of its inhabitants, can be taken on execution for the satisfaction of a demand against such county.

A county is but the political division of a State. (1 Black. Com. 113, 117; Constitution of Cal. Art. IV, Sec. 4; Art. VI, secs. 1, 8 and 9; Art. XI, secs. 4, 8, 9 and 13; Art. XII, Sec. 14.)

The counties have their own assessors, treasurers, auditors, etc. They have their own revenues for general and special objects. (Laws of 1850, ch. 42, Sec. 5, p. 115; ch. 43, secs. 1 and 9, p. 117; p. 153, Sec. 25; p. 138, Sec. 30.)

Russell v. The Men of Devon, 2 Term Rep. 671, was an action against some of the inhabitants of the county of Devon for an injury sustained in consequence of the county bridge being out of repair, but it was held that it could not be maintained.

That seems to have been the first experiment of the kind in the English Courts. In reference to which circumstance, Ashurst, J., remarked: "It is a strong presumption that that which never has been done, cannot by law be done at all." Both he and Lord Chief Justice KENYON declared that recourse must be had to the Legislature for that purpose, before such action can be maintained.

Again, in *Wilson v. The Commissioners of Huntingdon county*, 7 Watts & S. 199, it was held that, though, by an express act of the Legislature of Pennsylvania, a county might be sued, yet, that execution of a judgment obtained against the county could be had only in the manner provided for in the statute.

The revenues of the county, like those of the State, consist of various distinct funds, which are by law raised for, and devoted to, certain specific objects.

*These are made the subjects of distinct accounts, in the [54] books of the treasurer, and can only be paid out pursuant to orders of appropriation, and upon warrants only drawn by lawful authority. The treasurer cannot otherwise dispose of the funds without subjecting himself to a prosecution for a gross violation of his official duty.

The sheriff can derive no power, from the writ of *fieri facias* to invade the county treasury, and divert the funds from their legitimate objects for the purpose of satisfying some particular demand against the county.

I need only to refer to the case of *Hunsacker v. Borden*, decided by this Court at the July Term, 1855, as an authority directly in point, and as conclusive upon the question in this case.

There can be no question as to the power or authority of the Court, in a case like this, to relieve upon motion.

It is a fundamental principle of the common law, that the Court must possess power over its own process; and will, on application, interfere to prevent abuse; sometimes by quashing the writ, sometimes by ordering a discharge of the levy and a restitution of the property which had been seized.

Geo. F. & Wm. H. Sharp, for Respondent.

On the 28th day of October, 1852, the appellants made a contract with respondent to build a bridge.

The respondent fulfilled his contract, and not being paid, sued appellants for the contract price. The suit was severely contested by the appellants, and on the 22d of March, 1856, respondent finally recovered a judgment, which was afterwards, in all things, affirmed by this Court.

On the 10th day of January, 1857, respondent sued out an execution, and thereunder the sheriff of Contra Costa county levied upon the public buildings and certain unappropriated moneys of appellants, in the hands of the treasurer.

On the ——— day of ———, 1857, appellants moved the District Court "to vacate the levy." That motion was dismissed by the Court, and defendant appealed.

A dismissal of that appeal is asked by respondent, for the reason:

1. That no appeal lies. There was no order made, but only a refusal to make an order.

If appellants desired to present a case in such a shape as to authorize this Court to review it, they should have proceeded by bringing an action.

The refusal to grant an order is not subject to review. (Pr. Act, Sec. 336, sub 3; *Baker v. Rosenthal*, 7 Cal. June 7, 1857; *Henley v. Hastings*, 3 Cal. 341; *People v. Stillman*, 7 Cal. 117.

2. The first position assumed by appellants before this [55] Court *is, that the county not being suable when this debt was contracted, nor until after the Act of May 1, 1854, exempting certain county property, this property was exempt from seizure.

The suability of the county upon this claim is not an open question—it is established by the judgment. This contract being made before the passage of the act allowing counties to be sued, the question of suability was made by appellants both times this case was before this Court on appeal. In fact, at the last time it was the only question seriously urged. This Court did not deem the question of sufficient importance to notice it, and it is presumed that this Court considered the county suable, on this contract, upon common law principles.

Notwithstanding those decisions, the learned counsel, now representing the appellants, consider that if the county was not suable, at common law, at the time this contract was made, any law affecting the remedy does not impair the contract. In this light it becomes important to reconsider the question of suability.

The respondent freely concedes that no action lies at common law against a county for any liability growing out of a strict exercise of the right of sovereignty; those rights only that were formerly possessed by counties in England. All the cases cited by appellants are of that character.

Counties in this State are not strictly political local sovereign-

ties, but quasi-corporations, having extended powers for various purposes.

The suability of a county of this State, upon a contract not made while exercising rights of sovereignty, was never brought before this Court, except in this suit.

But the respondent insists that it is now well settled, at common law, that a political corporation is not exempt from any of the responsibilities of a private corporation, or an individual, except only while engaged strictly in the exercise of sovereign powers.

When they step out of those confines and make a contract, a right springs up, and the common law affords an ample remedy. (*Mayor, etc., of Lyme Regis v. Henley*, 3 Barn. & Ad. 77; *Clark v. The Mayor, etc., of Washington*, 12 Wheat. 40; *Hall v. Washington County*, 2 Green, Iowa, 473, in Liv. Law Mag. for '53, 623; *Martin v. The Mayor, etc., of Brooklyn*, 1 Hill, 545; *Western v. Same*, 23 Wend. 334; *People v. The Corporation of Albany*, 11 Wend. 539; *Moodalay v. The East India Co.*, Bro. Ch. 469.)

3. But concede that appellants could not be sued upon their contract, it was, nevertheless, a valid and binding one, and the Act of May 1, 1854, impairs it.

The fact that the appellants could not be sued on this contract, did not render its obligations less binding on appellants; nor the *fact that one of the contracting parties [56] was a County or a State even. (*Dartmouth College v. Woodward*, 4 Wheat. 518.)

All "stop" and "exemption" laws impair the obligation of contracts, and are opposed to the true interests of society. They should never be enacted to enable a corporation to deprive the honest mechanic of the reward of his industry. Such laws have never received favor from the Courts.

Laws wholly prospective in their operations can be endured, whatever may be their nature; but, when retroactive, or construed so as to work a retroactive effect, they work an evil but little below a robbery. This case would be a fit illustration of the wickness of such a law.

The respondent parted with his materials and performed the labor when no exemption law existed, and although not suable, if the opposing counsel's position be correct, the appellants if disposed to be honest, could have used this property now made exempt, to pay the debt due respondent.

An exemption law must protect both parties. It cannot protect appellants alone, but the respondent also.

This will not be the case if this property be exempt, because it enables appellants to appropriate the respondent's labor and materials, without recompense to him.

It is confidently asserted that no case can be produced of any Court of high authority, that has ever given a retroactive effect to such a law, even though the remedy might have been more ample when the contract was made.

This legislation, then, being subsequent to the making of the

contract, by judicial construction, must be held to refer to contracts made after that time, and not to affect past transactions. (*Quackenbush v. Danks*, 1 Den. 128; *Sackett v. Andrass*, 5 Hill, 334; *Von Schmidt v. Huntington*, 1 Cal. 65; *Mattheson v. Weller*, 8 Den. 52.)

The Act of May 15, 1854, allowing counties to be sued, only affected this contract by making the remedy more certain.

4. But, the appellants contend, that these funds are exempt, because they are the funds of a county.

This position cannot be sustained upon principle or authority. The only reason assigned by the Courts in the early English cases, why a county with only political powers could not be sued, was because it had no fund or property.

At the present day, when the powers of a county are so enlarged as to enable it to hold real estate, make contracts, etc., the reason fails. Before the passage of the Act above referred to, based upon the advancement of the times, this Court held that the property of a municipal corporation was subject to sale under execution. (*Smith v. Morse*, 2 Cal. 525.)

The Act of May 1, 1854, sets this matter at rest by defining what property of a county is exempt.

[57] This Act being a negative statute, the county is excluded from claiming as exempt property, not mentioned in it.

If that Act could reach this debt at all, it could not place this fund beyond the reach of this execution, because it specifically specifies what property shall be exempt from forced sale, and this is not included in the exemption. That Act, being in derogation of the common law, will not be extended by construction to property not embraced in it; and the Court will look at all the remedial statutes in construing it.

MURRAY, C. J., after stating the facts, delivered the opinion of the Court—BURNETT, J., concurring.

The first question presented is, whether an appeal will lie in such a case? The three hundred and thirty-sixth section of the Practice Act gives an appeal from "any special order made after judgment."

The question, then, is, what is an order? It may be defined to be the judgment, or conclusion of the Court, upon any motion or proceeding. It means cases where a Court or Judge grants affirmative relief, and cases where relief is denied. This is apparent from the language of the statute itself, which gives an appeal "from an order refusing to change the place of trial," etc. The counsel for the respondent relies upon the decisions of this Court, in *Baker v. Rosenthal*, **Henly v. Hastings*, 3 Cal. 341, and *People v. Stillman*, 7 Cal. 117.

The first case was an appeal from an order refusing to discharge an attachment before final judgment. In the second

case, we held that the party should have appealed from the original Act complained of, and not an order refusing to vacate it, and in the last case it was held that no appeal lay from an order refusing to change the place of trial, until after final judgment.

The appellants being entitled, then, to their remedy by appeal, it remains to be ascertained whether the Court below correctly refused to quash the execution.

At common law, an action did not lie against a county, and the law was the same in this State until the 11th of May, 1854, when the Legislature passed a special statute, authorizing counties to sue and be sued. Previously, on the 1st of May, of the same year, an Act had been passed, exempting the property of counties from forced sale upon execution.

The respondent contends that, inasmuch as the debt was contracted before the Act of May 1, 1854, it is not affected by the Act. In other words, that the Act is not retrospective, and if it were, it would be unconstitutional.

The answer to this proposition is, that the Act is but an affirmation of the common law. At the date of its passage, the plaintiff had no right, by his contract, to sue the county, take out an execution, and sell the county buildings; so [58] that the obligation of no contract is impaired, so far as he is concerned.

The levy upon the county revenues, in the hands of the treasurer, was illegal and void. These revenues are authorized by law, and appropriated to distinct purposes, and are not the subject of seizure upon execution.

Judgment reversed.

PEOPLE v. SUPERVISORS OF EL DORADO COUNTY.*

¹ CERTIORARI, WHEN WILL NOT LIE.—A writ of *certiorari* will lie in the District Court, to review the action of the board of supervisors; otherwise their action would be beyond control.

² SUPERVISORS, POWERS OF.—From the necessity of the case, supervisors exercise judicial, legislative, and executive powers, in matters relating to the police and fiscal regulations of counties.

APPEAL from the District Court of the Eleventh Judicial District, County of El Dorado.

Noteware, recorder of El Dorado county, presented an affidavit to the board of supervisors in that county, stating that, for a long period of time, he had performed the duty of auditor faithfully, in drawing warrants upon the county treasurer, and prayed therein that he be allowed compensation therefor. On

*See *People ex rel. Rann & Plant v. El Dorado Co.*, 11 Cal. 170.

1. Approved *Robinson v. Sacramento*, 16 Cal. 210. Cited *Fall v. Paine*, 23 Cal. 308; *Murray v. Mariposa Co.*, 23 Cal. 495.

2. Cited *People v. Marin Co.*, 10 Cal. 345; *Uridias v. Morrill*, 22 Cal. 478; *Stone v. Elkins*, 24 Cal. 127; *Miller v. Sacramento*, 25 Cal. 97; *Emery v. Bradford*, 29 Cal. 85; *Kimball v. Board of Supervisors*, 46 Cal. 23. Disapproved *People v. Provinces*, 34 Cal. 528, 541; *State v. Ormsby Co.*, 7 Nev. 397.

this affidavit, the board allowed him the sum of seventy-five cents for each and every warrant that he had drawn, as auditor, upon the treasurer, and directed him to draw a warrant in his own favor, for the amount of his services estimated upon the basis of seventy-five cents for each warrant.

After the passage of this order, Noteware drew a warrant in his own favor, for two thousand three hundred and twenty-seven dollars and seventy-five cents, presented it to the county treasurer, who registered the same, and endorsed thereon "not paid for want of funds."

The relators allege that they were tax-payers of El Dorado county, and interested in an economical expenditure of the public funds. That the supervisors, in allowing the Noteware claim, exceeded their jurisdiction, and violated the express provisions of law; and prayed that the treasurer might be enjoined from paying said warrant, and Noteware restrained from transferring it, and also that a writ of *certiorari* issue, to the board of supervisors, commanding them to certify their proceedings in the Noteware matter to the District Court. The relators afterwards amended the prayer of their petition, and asked that a writ of prohibition might issue, prohibiting the supervisors from doing any act affecting the Noteware claim, and that the said board be required to revoke all their previous orders.

[59] *The Court below temporarily enjoined the treasurer from paying the Noteware warrant and Noteware from negotiating it, and also directed the *certiorari* to issue to the supervisors.

Some of the defendants answered, and others demurred to the petition of relators. The Court below, in an elaborate opinion, on the authority of *The People v. Hester*, alone, dismissed the petition of relators, and entered judgment for the defendants. From the judgment this appeal was taken.

Sanderson & Hewes, for Appellant.

This proceeding was instituted for the purpose of obtaining a review of certain proceedings had by the board of supervisors, whereby a certain allowance, alleged to be illegal, was made to the said auditor, and for which the auditor had drawn his warrant, which had been presented to and accepted by the treasurer. As against the board, a writ of *certiorari*, in the first instance, was sought. As against the auditor and treasurer, an injunction restraining the first from negotiating or otherwise disposing of the warrant, and the latter from paying the same.

Subsequently, the information was so amended as to ask also for a writ of prohibition, or some other remedy, as against the board of supervisors.

The Court below refused all relief.

A writ of *certiorari* was refused, because this Court had decided in *Church v. Hester*, that it does not lie to the board of supervisors.

A writ of prohibition was refused, because, in the opinion of that Court it was not the proper remedy.

In our judgment, the decision as to prohibition is correct; and but for the case of *Church v. Hester*, the writ of *certiorari* would have been granted.

We seek, therefore, a review of *Church v. Hester*, being satisfied that the points decided in that case could not have been maturely considered by this Court.

The ground upon which the writ of *certiorari* was refused in that case was this: "The supervisors not being judicial officers, or charged with the exercise of judicial duties, it results that the writ cannot be properly directed to them." (*People ex rel. Church v. Hester*, 6 Cal. 679.)

We respectfully submit that this Court erred in saying that "supervisors are not charged with the exercise of judicial duties."

In our judgment, the Act creating the board of supervisors, (Statutes of 1855, p. 53, sec. 9,) does charge them with the exercise of judicial duties.

They have to perform precisely the same Acts that a Court would were the claim prosecuted before it. They have to hear testimony, find the facts, construe and apply the law to those facts, to ascertain and settle the legal rights of the parties before them, and pronounce a judgment for or against one or the other. [60]

Are not these judicial acts?

Province of writ discussed—*Ex parte Mayor, etc., of Albany*, 23 Wend. 277; *Storn v. Mayor, etc.*, by Senator Paige, 25 Wend. 164.

Newell & Williams, for Respondents.

In the Court below, we questioned the right of the relators to institute this proceeding. They claim the right to occupy their present position upon the ground of being tax-payers, but, at the same time, show that their property is not in danger through taxation or otherwise, of being liable to the payment of the debt, for they say that the county is now largely in debt, and that the allowance made Noteware, defendant, increases that debt, which must be, in future, discharged. They charge the payment of the demand to posterity, without showing that they have permanent property, or might otherwise become liable; therefore, their interest in the subject-matter of litigation is too remote.

The statute of 1855, p. 55, sec. 21, by its terms, authorizes them to have appeared before the board of supervisors, and there to have resisted defendant, Noteware's claim. Had they done so, and then, had the board allowed the claim, the relators could have sought relief by *certiorari*, (admitting that the writ would be in a proper case.) By that course, they would properly have become parties to the proceeding, and the statute authorizes *certiorari* when there is no other remedy, etc.

We maintain, that the board is a sort of judicial body, constituted by law to decide all matters of account between individuals and the county, and that their decision stands as final until reversed by a higher tribunal, (2 Sandf. 472,) and that their decisions cannot be attached in any collateral proceeding, but, that under the statute, persons who wish to become parties to a proceeding before them, must do so in the first instance, and thereby place themselves in a position which would enable them to apply for relief to a higher tribunal if they felt aggrieved, which application would be in the nature of an appeal.

Were it otherwise, there could be no end to the lawsuits in which a man might become involved, if he should be so unfortunate as to have an allowed claim against a county. Take the case before us, for instance: Rann and Plant have sued out this writ; if they fail, what is to prevent other enemies of the defendant, Noteware, from instituting a similar proceeding, and so on through a great number of the tax-payers of the county; but if the course we suggest be correct, then all who wished to resist the claim could have appeared before the board, made their objections, and then, necessarily, have become parties in the [61] appeal, *or *certiorari* proceeding. Relators are too late in their opposition to defendant's claim.

MURRAY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

This was an application for a writ of *certiorari*, to review the action of the board of supervisors of El Dorado county, in a certain proceeding before them, touching the allowance of an account. After the petition had been filed, the plaintiff, by leave of the Court, amended it, asking for a writ of prohibition or injunction. The Court refused the writ, and dismissed the application. The judgment of the Court below was doubtless based on the decision of this Court in the case of *People v. Hester*, 6 Cal. 679. The counsel for the appellant has sought a review of that decision, and we have cheerfully acceded to his request, as we have been satisfied for some time that the decision was incorrect, and ought not to be maintained. The case of *People v. Hester* was submitted to us without argument; after its decision, we ordered the case to be argued for our own information, and invited the bar generally to participate in the discussion. No one feeling sufficiently interested in the Court, or the correctness of its decisions, to appear in the case, the former opinion was allowed to stand. Subsequent cases, however, showed that the rule thus established would have to be abandoned, or the most important rights of parties would be left to rest entirely upon the uncontrolled discretion or caprice of county supervisors, and that the legitimate result of the decision would be to place the inferior or subordinate agents of the people beyond the reach and control of all supervisory power.

The decision in the case of *People v. Hester*, proceeded on the ground, that the third article of the Constitution of this State

had so distributed the powers of government, as to forbid those charged with duties belonging to one, from exercising functions appertaining to another department. That by law, a writ of *certiorari* could only issue to an inferior board or officer exercising judicial functions, and that it was inconsistent with the theory of the distribution of powers by the third article, for the supervisors to exercise judicial functions. This would equally apply to the writ of prohibition, but it is not perceived on what ground the Court below, in the present case, refused to interpose by injunction.

The error in the case of *People v. Hester*, consisted in overlooking the fifth section of the ninth article of the Constitution, which provides, that "The Legislature shall have power to provide for the election of a board of supervisors in each county, and these supervisors shall jointly and individually perform such duties as may be prescribed by law." This section must be regarded as a limitation on the third article. In using the word "supervisors," the Constitution intended to adopt [62] it with its known meaning, and in the sense in which it was generally understood.

The word "supervisors," when applied to county officers, has a legal signification. The duties of the officer are various and manifold; sometimes judicial, and at others, legislative and executive. From the necessity of the case, it would be impossible to reconcile them to any particular head, and, therefore, in matters relating to the police and fiscal regulations of counties, they are allowed to perform such duties as may be enjoined upon them by law, without any nice examination into the exact character of the powers conferred.

This rule will preserve the utility of these officers, while it is, at the same time, in harmony with the spirit of the Constitution itself. It remains but to add, that the decision of this Court, in the case of *People v. Hester*, is erroneous, and that we are happy that so early an opportunity has been presented to us for correcting the same.

Judgment reversed, and cause remanded.

ASHBURY v. SANDERS.

PRESUMPTION OF LIFE.—WHEN IT CEASES.—In the case of an absent person, from whom no tidings are received, the presumption of life ceases at the end of seven years.

IDEM.—To shorten this time, there must be evidence of some specific peril to the life of the individual.

IDEM.—WHAT INSUFFICIENT.—The fact that a fugitive from justice had not been heard of for sixteen months, and that he was a passenger on a particular vessel bound for a specified port, and that neither the vessel nor crew had ever been heard from, is not sufficient to raise a legal presumption of his death.

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

This was an action to foreclose a mortgage executed by G. J. Hubert Sanders to plaintiff, to which his wife was made a party defendant, who, in her answer, set up as matter in abatement the death of her husband on the high seas. The remainder of this case is sufficiently stated in the opinion of the Court. Judgment for defendant, and plaintiff appealed.

G. P. Fobes and H. S. Love, for Appellant.

The Court erred in deciding that G. J. Hubert Sanders was dead, on the proof introduced, as a person is not presumed to be dead until after the lapse of seven years from the time he was last heard from. (1 Greenleaf on Evidence, sec. 41 and notes; 11 N. H. 191; 4 Whart. 150; 4 Whart. 173; 1 Barb. Ch. 455; 10 Pick. 515; 1 Stark. 121.)

[63] **B. S. Brooks, for Respondents.*

I presume there can be no question that a dead man cannot be sued; that the action is improperly brought if the defendant, G. J. Hubert Sanders, is dead; that the claim, like any other, must be presented to the administrator; that no suit can be brought affecting the estate until the claim has been passed upon by the administrator and rejected, unless by special leave of the Court; that the administrator is a necessary party to any such suit, and until an administrator is appointed no suit can be brought; that if the widow, or next of kin, or public administrator, will not take out letters of administration, the creditor may do it himself. I understand all this to be distinctly provided by statute, and in effect determined by the Supreme Court in the cases of Folsom's executors.

It appears to me equally plain that any party to the suit may set up in defense, either in abatement or bar, any matter which shows that the suit cannot be maintained. The plaintiff cannot sue a dead man; and the dead man can hardly be expected to plead his own disability. The objection is an answerable one. It shows conclusively that suit cannot be maintained, and it can only be taken advantage of by another defendant.

The cause went to trial on this issue of death, and the evidence was very conclusive of these facts:

That the bark *Elvira Barbeck*, Marshall, master, bound from this port to Manila, arrived at Honolulu, and sailed from that port the second day of May, 1855. That G. J. Hubert Sanders was a passenger on board, and was seen and conversed with on board at Honolulu by a gentleman residing there, and wrote from that port to his connections here, speaking of his being on board of that vessel as a passenger. That he has never been heard from by his family since. That the *Elvira Barbeck* has never been heard from since her departure from Honolulu. That the insurance has been paid upon the vessel as a total loss, and the family of Capt. Marshall, long since went into mourning for him as dead.

Upon these facts, very satisfactorily proved, the Judge before whom the cause was tried found that the defendant, G. J. Hu-

bert Sanders, died before the commencement of the suit. The only material question in the suit, as I understand it, is, whether the evidence was sufficient in law to prove the issue.

BURNETT, J., delivered the opinion of the Court—MURRAY, C. J., concurring.

The only question of fact in this case, decided by the Court below, was the alleged death of Sanders, the defendant. It was shown, in proof, that Sanders left San Francisco in the bark *Elvira Harbeck*, for Manila; that said bark arrived at the Sandwich Islands on the 2d day of May, 1855, and soon left, with *Sanders on board, since which time nothing has [64] been heard of him, or of the vessel, or any of the crew; that the insurance on the vessel, as a total loss, had been paid, and the relatives of the master and his wife, who were on board, went into mourning for them, and had given them up as lost. It was also shown that Sanders was indicted for a felony, and had absconded. The trial in the Court below was held on the 17th of September, 1856, being sixteen months from the time the defendant was last heard of. The case was tried without a jury, and the Court found the death of the defendant, and the plaintiff appealed to this Court.

This is one of those cases where a question of fact must be settled by presumption, without positive proof. Every system of law must, from necessity, indulge in presumptions in certain cases. The presumption may be arbitrary, but still indispensable. Questions must be settled, and all that can be done, is to adopt the most reasonable presumption that the case allows; and as presumptions must be indulged, in such cases, it becomes most important that some certain and consistent rule should be adopted.

The general rule upon this subject is concisely stated in the forty-first section of *Greenleaf on Evidence*: "Where the issue is upon the life or death of a person once shown to have been living, the burden of proof lies upon the party who asserts the death. But after the lapse of seven years without intelligence concerning the person, the presumption of life ceases, and the burden of proof is devolved on the other party." "But where the presumption of life conflicts with that of innocence, the latter is generally allowed to prevail."

In this case, it was not the simple fact that Sanders had not been heard of for sixteen months, but it was that fact taken in connection with the other facts, that he was on board a particular vessel, bound to a specified port, and that neither the vessel, nor any of the crew, had been heard from, upon which the Court below predicated its findings. It must be conceded that the presumption of the death of a particular person, under such circumstances, is much stronger than the mere fact of absence would ordinarily justify. But is the presumption arising from such circumstances sufficiently strong to overcome the presumption of life?

In the case of *King v. Paddock*, 18 Johns. 143, it was held, that when a man sailed in a vessel from New York, on a voyage to South America, and had not been heard of for twelve years, his death must be presumed. It is true, in that case, SPENCER, C. J., said: "In the present case, the jury were authorized to presume his death in a much shorter period. The facts justified them in presuming Paddock's death, by the foundering or wreck of the vessel in which he left New York. The pre-

[65] *sumption does not rest merely on the fact of his not being heard from, but from the vessel not being heard of, nor any part of the crew."

It must be conceded that while the facts of that case are very different from the circumstances of this, still, the language of the Chief Justice would certainly convey the idea, that the proof would have been sufficient to establish the death within a much shorter time than that proved by the testimony. But it is not stated what period would have been held by the learned Judge as sufficient. In that case, Paddock was master of the vessel, while in this, Sanders was only a passenger, and a fugitive from justice. In the first instance, Paddock had every inducement to return home, while in the second, Sanders had every reason to remain abroad, and to conceal the fact of his existence from the people he had wronged.

In the case of *Smith v. Knowlton* (11 N. H. 191), it was proven that Josiah D. Smith, sailed as one of the crew of the schooner Sarah Atkins, from Portsmouth to the South Seas, in September, 1828, and that a letter was received from him, dated at the Falkland Islands, April 14, 1829, and that neither Smith, nor the schooner, had ever since been heard of, except by some rumors respecting the vessel, which had never been traced to any authentic source. In August, 1831, two years and four months after the date of the last information from Smith, a judgment was had against M. B. Trundy, as his trustee. This judgment was held to be good by the Superior Court of New Hampshire, upon the ground that the circumstances did not warrant the presumption of Smith's death. PARKER, C. J., in delivering the opinion of the Court, said: "We are not aware of any rule or principle of law on which we can presume that Josiah D. Smith was dead in September, 1831, when the judgment was rendered against him, in the action in which defendant was charged as his trustee."

The Court refused to adopt the period of time after the expiration of which the statute of that State authorized a decree of divorce, when the husband or wife had been absent without having been heard from, as establishing any rule for the government of presumptions in other cases.

The opinion of the Supreme Court of Pennsylvania, delivered by Chief Justice Gibson, in the carefully considered case of *Burr v. Sim* (4 Whart. 150), seems to lay down the correct rule upon this subject. In that case the English rule was adopted, that in the case of an absent person, of whom no tidings are re-

ceived, the presumption of life ceases at the end of seven years. It was also held that the presumption of death must only run from the termination of the period mentioned, unless there were circumstances given in evidence, to quicken the time. And in reference to what circumstances will take the case out of the rule, *the Chief Justice remarks: "In the case at [66] bar, we must say there was an error in leaving the jury to presume the death to have been at an intermediate period, unless we discover in the case at least a spark of evidence that the individual was, at some particular date, in contact with a specific peril, as a circumstance to quicken the operation of time. The circumstance relied on is, the departure of the individual by sea; but the perils of the sea are general, not specific, and they are not present, but contingent."

The rule laid down by Chief Justice GIBSON seems to be the most reasonable, simple, and certain. For these reasons, I think the judgment of the Court below should be reversed, and judgment should be entered in that Court for the plaintiff.

REVALK v. KRAEMER.*

- 1 **INJUNCTION, WHEN WILL NOT LIE.**—A party cannot bring suit in one Court, to restrain the decree of another Court of co-ordinate jurisdiction.
- 2 **HOMESTEAD, WHAT PROPERTY MAY BECOME.**—The separate property of the husband acquired before marriage, may become the homestead, as well as the common property of the husband and wife.
- 3 **IDEM.**—As to the separate property of the wife—*quære*.
- 3 **HOMESTEAD, PARTIES NECESSARY IN ACTION FOR.**—Where the homestead was claimed by the husband, on an action in which he was alone defendant, to foreclose a mortgage made by him alone, since marriage, neither the rights of the husband or wife could be affected by the proceedings in that case, the wife not being a party. Legal proceedings, to be conclusive against either, must embrace both.
- 4 **IDEM.**—**MORTGAGE BY HUSBAND, WHEN VOID.**—A mortgage of a homestead, signed by the husband alone, is absolutely void where its value does not exceed five thousand dollars. When a husband ceases to be the head of a family, the right to a homestead also ceases.
- 5 **IDEM.**—A mortgage, void because it was upon a homestead, will not become valid, by reason of the homestead right being lost by the death of the wife of the mortgagor without children; the debt which the mortgage was intended to secure, is not impaired, but it is placed on the same level with the other debts of the mortgagor, and must be enforced in the same manner.
- 6 **IDEM.**—**WHO ENTITLED TO RIGHT OF.**—Any individual, whether married or not, may be the head of a family, and as such, entitled to a homestead right.
- IDEM.**—**RIGHT, WHEN LOST.**—But when this relation ceases, the right also ceases.

*See *Rickett v. Johnson*, ante 34; *Chipman v. Hibbard*, post 268.

1. Distinguished, *Pisley v. Huggins*, 16 Cal. 134; cited *Crowly v. Davis*, 37 Cal. 269; 22 Wis. 486.

2. Cited *Gimmy v. Doane*, 22 Cal. 638; *Riley v. Pehl*, 23 Cal. 74.

3. Approved, *Kraemer v. Revalk*, post 73; *Van Reynegan v. Revalk*, post 76; *Marks v. Marsh*, 9 Cal. 97; *Larson v. Reynolds*, 13 Iowa, 583; *Morris v. Ward*, 5 Kan. 246, 249. Character of homestead estate, *Estate of Buchanan*, post 509; *Brennan v. Wallace*, 23 Cal. 114. Disapproved, *Gee v. Moore*, 14 Cal. 477. Nature of wife's interest, *Adams v. Beale*, 19 Iowa, 68.

4. Approved, *Van Reynegan v. Revalk*, post 76; *Cook v. Klink*, post 353.

5. Cited *Himmelmann v. Schmidt*, 23 Cal. 120; *Larson v. Reynolds*, 13 Iowa, 583.

6. Approved, *McQuade v. Whaley*, 31 Cal. 636; *Barney v. Leeds*, 51 N. H. 267, 273.

APPEAL from the Superior Court of the City of San Francisco.

John Revalk was married in September, 1854, and he and his wife resided upon the premises in controversy, from that time until her death in October, 1856. He owned the premises before marriage, and on the 11th day of December, 1854, he alone executed to defendants, Kraemer and Eisenhardt, a mortgage upon the homestead for four thousand dollars. The defendants brought suit to foreclose the mortgage in the Twelfth District Court, in which suit, John Revalk appeared and claimed the right of homestead; and by decree of the Court, the premises were directed to be sold, except a portion, which was set apart as a homestead. Before the sheriff proceeded to sell under [67] the decree, Revalk and wife brought this suit, to enjoin the defendants and sheriff from carrying the decree into effect. An injunction was issued, and the sale restrained. This case was tried before a jury, and a special verdict found; but while the Court had the verdict under advisement, Mrs. Revalk died, leaving no children. Her death being suggested by the attorneys of defendants, and admitted by the attorneys for the plaintiff, the Court rendered judgment against him, from which he appealed to this Court.

Pixley & Smith, and *L. Aldrich*, for Appellant.

The appellant presents to the Court the following points, upon which he submits that the judgment should be reversed:

First—The mortgage executed by the appellant was void. The statute by which the homestead is exempted from forced sale declares "That no mortgage sale, or alienation of it, of any kind whatsoever, shall be valid without the signature of the wife, acknowledged separately and apart from his husband." According to the settled decision of this Court, any act of alienation of the homestead by the husband, without the concurrence of the wife, given in the manner already pointed out, is absolutely void, both as to husband and wife, to the extent of the value of five thousand dollars. In the case of *Taylor v. Hargous*, 4 Cal. 268, the Court say, with reference to the conveyance of the homestead by the husband alone, "the conveyance, by the husband alone, is declared by the statute to be void, and this rule cannot be subverted, unless it be in favor of an innocent purchaser without notice." In the case of *Sargent v. Wilson*, 5 Cal. 504, the general language of the first decision is, to some extent, qualified, and a mortgage upon the homestead executed by the husband, without the concurrence of the wife, is declared void as to the homestead value.

It results from these decisions, not only that the mortgage in question was absolutely void, both as to the appellant and his wife, but that the legal proceedings instituted for its foreclosure are inconclusive, either against the appellant or his wife, she not having been a party to these proceedings. This also results from the prohibitory provisions of the homestead law with regard to the conveyance of the estate, and from the policy and objects

of the law, and also from the character of the homestead estate as it has been defined by the decisions of this Court. The husband, during the life of the wife, can do nothing to divest himself or the wife of the homestead estate, except with her assent, expressed in the manner already pointed out. It follows that legal proceedings, to be conclusive against either, must embrace both. If the law declares the alienation of the homestead by the husband, without the concurrence of the wife, absolutely void as against both, can it be said with any show of reason, that *the husband may go into Court, in a pro- [68] ceeding against him alone, and concede away his rights in the homestead, or by his neglect properly to assert and defend them, or by the collusion with mortgagee, exclude himself from again setting them up.

Second—The appellant submits that the cause of action survived to him upon the death of his wife, and that the Court below should have proceeded to render judgment in his favor. It will be seen by the opinion of the Court below, which appears in the record, that the Court did not regard the proceedings of the District Court as conclusive against either of the original parties to this suit, but based its judgment entirely upon the supposed validity of the mortgage in question rendered so by the death of the wife, and the supposed incapacity of the appellant to take by survivorship. Before presenting our views with regard to the right of appellant to take as survivor, we submit that, if the proceedings of the District Court were not conclusive as against either of the parties, and the Court below so regarded them, as appears by its opinion, whether the cause of action survived or not to the appellant, the Court should have proceeded to render judgment, in conformity to the verdict, notwithstanding the death of the wife, as though her death had not occurred. The rule of practice is, that, if a party die after verdict, and pending the time for argument or advisement, judgment may be entered on the verdict *nunc pro tunc*, as of a day when the party was alive. (2 Tidd's Practice, 845, 932, 933, 934; 2 Dunlap's Practice, 746; 8 How. Pr. 244, 9 Ves. 461; 4 John. Ch. 333; 1 John. Cas. 411; note at the end of the case of *Mackay v. Rhineland*, 12 Wend. 245; 4 Cow. 423.) It is said in argument for respondents, that the rule invoked by the appellant applies only to cases at law. It will be seen, however, by reference to the authorities above cited, that the rule is applied to cases in chancery. It is said that the Chancellor refers the issues to the jury for his own information, and may disregard entirely the findings of the jury thereon, if he should deem it proper to do so. It is true that the Chancellor may disregard the findings of the jury, but it is rare so to do, and such disregard is always based upon manifest inconsistency between the testimony and the findings. It is not pretended that there was any such inconsistency in this case, and, fortunately for the appellant, he has the opinion of the Chancellor, showing his full recognition of the facts found by the jury, and especially the fact that the

premises were the homestead of the appellant and his wife when the mortgage was executed, and basing its action upon those findings upon the grounds before stated.

To deny this right to take the homestead by survivorship, seems to us to be at war with the decisions of this Court, and with the humane purposes of the law. To strip the husband of *his property in the moment of his misfortune, and to allow creditors to seize upon the estate immediately upon the decease of his wife, is a doctrine which this Court cannot sustain, unless compelled to do so by the rigid provisions of the law. Suppose, upon the death of the wife, the husband should desire to bring about him other members of his family, his mother, his sisters, or other relatives, at what time must this be done? According to the doctrine contended for here, the property may be instantly seized, and subjected to the claims of creditors, notwithstanding any such intention on the part of the husband.

The opinion of the Court below, so far as it was against this right of survivorship, was based entirely upon the fact, that in the tenth section of the Homestead Act there is no provision made for the husband upon the death of the wife, as there was for the wife, children, and next heirs-at-law, upon the death of the husband. It is sufficient to say, that no such provision was necessary. He was the head of the family. The homestead was permanently secured to him, unless it was parted with in the mode pointed out by law. The Legislature did not regard it as likely that any controversy would arise between him and an administrator, or that there would be any necessity of setting the homestead apart to him.

Sydney V. Smith, for Respondents.

If the language of section fifteen of article eleven of the Constitution, directing the Legislature to protect the homestead, be attentively scanned, it will be seen that it authorizes the Legislature to protect the homestead which shall be created out of the common property, not one to be created out of the separate property of either husband or wife. The language is, "The homestead of all heads of families." That this is the correct meaning of that clause, is apparent when taken in connection with the previous section, which declares that a wife's separate property shall be preserved to her.

It is submitted that the decree of the Twelfth District Court, unappealed from, and in full force as it was when the first action was brought, was a complete bar to this action.

John Revalk, the husband, was duly brought into Court and defended for a homestead. He obtained one, not to the extent he sought, it is true, but still the Court awarded him one. Instead of moving for a new trial, or of appealing, he and his wife brought the present action.

In this action, by which the decree of the Twelfth District Court was stayed by the injunction of the Superior Court, the

same issues were raised and tried as in the suit in the Twelfth District Court. The only difference was, that the parties were reversed, and Revalk's wife was joined as plaintiff.

Now, it is submitted that the husband, having appeared and *defended his alleged claim to homestead, such claim [70] being not only for the benefit of himself, but of his wife, such defense inured to her.

When, therefore, the Twelfth District Court, sitting as a Court of Equity, with full knowledge of the marriage, and upon the defense interposed, decreed that Revalk and his wife were entitled to a part of the property as a homestead, but that the remaining portion was free of all claim of homestead, and should be sold to pay off the mortgage held by Kraemer & Eisenhardt, that decree should have been respected by the Superior Court, and the motion to dissolve the injunction should have been allowed.

It was purely an equity case. In the course of the proceedings, certain questions of fact were submitted to a jury, and a special verdict rendered by them. The cause was then left for future hearing before the Court. Before the day of hearing came on, the wife of appellant died, leaving no children. The fact of the death of the wife having been suggested to the Court, the Court thereupon gave judgment for defendants, respondents herein, and dissolved the injunction.

From this judgment the present appeal was taken. Admitting that the property in question was the homestead of the appellant, and was such at the time the mortgage was made by him to respondents, then, under the decision in *Taylor v. Hargous*, there was a joint-tenancy existing between appellant and his wife, with the right of survivorship.

When appellant made his mortgage to respondents, he had (by reason of the homestead) no present estate in the premises, which he could then dispose or convey by way of mortgage.

The mortgage, therefore, though purporting to convey the land described in it, was invalid for that purpose, yet it was, as a contract between appellant and respondents, perfectly good; it was, in fact, a mortgage of an estate in expectancy, dependent upon his surviving his wife.

Upon the death of the wife of the appellant, by virtue of the doctrine of survivorship, the whole estate, legal and equitable, became immediately vested absolutely in him.

Now, both by the common law and by the thirty-third section of the Act concerning conveyance, passed in 1850 any person who conveys land, the title to which is not in him at the time, if he afterwards acquire the title, such title immediately passes to the grantee, and the conveyance made to him has the same effect as if the title had been in the grantor at the time of the conveyance, and this upon the doctrine of estoppel.

The term "conveyance," by section thirty-six of the Conveyancing Act, embraces mortgages.

The consequence of the death of the wife, therefore, was im-

mediately to give effect to the mortgage of respondents, not only as a contract of the husband, but as a lien on his property.

[71] *BURNETT, J., after stating the facts in the case, delivered the opinion of the Court—MURRAY, C. J., concurring.

The plaintiff should have brought their suit in the District, and not in the Superior Court. When the plaintiff, John Revalk, appeared and answered in the case brought by defendants, Kraemer and Eisenhardt, to foreclose the mortgage, the plaintiffs in that suit—defendants in this—should have insisted that Mrs. Revalk be made a party. Revalk and wife not appearing in that suit, could not bring a suit in the Superior Court to restrain the decree of a Court of co-ordinate jurisdiction. (*Rickett v. Johnson*, ante 34,)

This would be sufficient to dispose of this case, but as other points are raised by the record, and discussed by counsel on both sides, and must be decided sooner or later, to settle this controversy, we will proceed to their examination.

The first point made by the counsel for the defendants is:

“That inasmuch as the property in question was owned by John Revalk before his marriage, and was therefore separate property there could be no homestead created of it by the mere residence of the wife thereon, before marriage.”

The fifteenth section of article eleven of the Constitution, provides, “that the Legislature shall protect, by law, from forced sale, a certain portion of the homestead and other property of all heads of families.”

In this provision, the homestead to be protected, is called the property of the head of the family. And in the first and second sections of the Act to exempt the homestead and other property from forced sale, (Com. Laws, 850,) the head of the family is called “the owner” of the homestead.

It would seem clear, from these provisions, that the separate property of the husband may become the homestead, as well as the community property acquired after marriage. It is the duty of the husband to furnish a home for the family, and the taking the wife to reside upon his separate property, is the voluntary act of the husband, and by this act he makes it the homestead, with all the incidents attached to it.

But it may admit of great doubt whether the separate property of the wife can become the homestead. There is an express provision of the Constitution which says, that all property of hers acquired in a certain manner, shall be her separate property. (Article XI, Sec. 14.) There is no such provision in reference to the husband. This being a constitutional provision, it may admit of much doubt, whether the mere act of the wife, of residing with her husband on the premises, can be construed into a change of her right with respect to her separate property. It is her duty to live with her husband, and her removal with him from the homestead has been held no abandonment. (4

Cal. 273; **Selover v. American Commercial Co.*, 7 Cal. [72] 266.) Besides, there is no necessity for the Legislature to extend the right of homestead to the separate property of the wife, for the reason that it is already protected from forced sale, because it is hers. It is not responsible for the husband's debts, and can only be sold by the free consent of the wife. But in reference to this question, as it does not necessarily arise in this case, we do not express any decided opinion.

The second point made by the counsel of defendants is "that the action brought in the Twelfth District Court, for the foreclosure of the respondent's mortgage, and the decree made thereon, was a perfect bar to the present action."

The wife was no party to the suit in the District Court, and could not in any way be affected thereby; nor could the rights of the husband, as to the homestead, be affected by the proceedings in that case. When the husband appears alone and defends the suit, his right to the homestead is no more concluded by the decision, than by his separate execution of the deed or mortgage.

Legal proceedings to be conclusive against either, must embrace both. The separate answer of Revalk, for himself, did not constitute any defense.

If these views be correct, then the result of the mortgage suit did not conclude Revalk and his wife, or either of them. It is true that they were bound to bring their suit in the District Court if they wished to restrain the sale.

The third and last point made by the counsel of the defendants is: "That the death of the wife of appellant, gave the husband such an estate as inured to the benefit of the mortgage made by him alone, during his wife's life, to respondents."

This question may properly be considered under two aspects:

1. Whether the privilege of the homestead ceases, when the party ceases to be the head of the family.

2. Conceding that it does, in what manner would the title inure to the benefit of creditors?

The leading idea, upon which the Constitution and statute are both predicated, is the protection of the family. To carry out this intent, the homestead of the head of the family is protected from forced sale. Any individual of either sex may be the head of a family. It is not necessary that the head of a family should be a married person.

But, unless the person is the head of the family, the right of homestead cannot exist. And cannot the same person, at one time, be the head of a family, and not at another? And if the privilege is an incident to a certain state, and that state itself ceases, why should not the incident fall with it? As the primary object of the law was the protection of the family, when the family ceases to exist the reason for the privilege is gone; and why should not the privilege itself also cease? As the end contemplated by the law can no longer be attained, [73] why should the means be preserved when they are no

more wanted? As the law will not allow an individual the right of homestead before he becomes the head of a family, why should it allow him this right after he ceases to be such? The very reason why the law will not allow it in the one case, is equally applicable in the other. When an individual has not been, or has ceased to be, the head of a family, the law cannot anticipate that he will thereafter become such, in either case. When he does, in fact, become the head of a family, then the law protects him for their benefit. He is the representative of the family. But when there is no family to protect, will the law defeat the just claims of creditors for the purpose of accomplishing no beneficial end? It is true the party once had a family, and he also once had protection for that family; but since the family has ceased to exist, the protection is not needed. The law intended to protect individuals while bearing certain relations towards each other. When that relation ceases, the cause of the protection is gone. The reason ceasing, the rule ceases. The privilege and responsibility must go together. One is rightfully dependent upon the other. When the individual has no longer the cares of a family, the law should not still protect him as if he had; he should only be protected as others are, who are at present in the same state. The law does not look to his past, or future, but to his present condition.

In the case of *Taylor v. Hargous*, 4 Cal. 273, the learned Judge who delivered the opinion of the Court, expressed the opinion that the right of the husband and wife to the homestead was a "sort of joint-tenancy, with the right of survivorship, at least as between husband and wife." This is, no doubt, true, as a general proposition; but still the parties do not stand precisely equal in every respect. Our statute and the Constitution have made some difference between them in reference to some particular.

While the husband lives, he is considered the head of the family; and upon his death, the widow takes that capacity, and all the incidents, privileges, and responsibilities, attached to it. (*Wood v. Wheeler*, 7 Tex. 13.) But when the wife dies, the surviving husband takes upon himself no new capacity, but continues as he was before, the head of the family. It is true, that now he can alienate or incumber the homestead by his single deed. But when the wife survives, and there are legitimate children of the deceased husband, the homestead is directed to be set apart for her and the children. In such case, could she afterward alone sell or incumber the homestead? It is at least doubtful. If there be no surviving wife or children, then the homestead goes to the next heirs of the husband. (Sec. 10.) There is no such provision where the wife dies, and the husband survives.

[74] *Upon the death of the husband the homestead descends, exempt from his debts, by a special provision of the statute. Had it been the intention of the Legislature to have given the surviving husband the same exemption, whether

he has or has not any family left, then this provision would not have been specially confined to the case mentioned, but would have been general, so as to embrace all. It is true the homestead may continue exempt from sale after the death of the wife, for the reason that the surviving husband may continue the head of a family. The protection is given to that capacity, and as that capacity continues, the protection does not cease.

If these views be correct, upon the death of Mrs. Revalk the surviving husband ceased to be the head of a family, and the protection of the former homestead also ceased.

We will now proceed to consider the question as to the manner in which the property would be liable to the debts of the surviving husband. In the case of *Taylor v. Hargous*, already referred to, it was said, "the conveyance by the husband alone, is declared by the statute to be void." In the case of *Sargent v. Wilson*, 5 Cal. 504, it was held that the deed in such a case, was not "absolutely void, but only as to the homestead value." (See also *Morse v. McCarty*, July, 1856; and *Poole v. Gerrard*, 6 Cal. 71.)

From these decisions it follows, that the mortgage is void only as to the homestead value. The mortgage being void as to the homestead value, it can never be rendered valid by any subsequent event. But while the mortgage itself is void, and but an incident to the debt, the debt remains good, and the property will be liable for the debt in the same way as if the mortgage never had been executed. In other words, the mortgagee stands upon equal footing with other creditors, neither in a better or worse condition on account of the mortgage.

Judgment affirmed.

KRAEMER ET AL. v. REVALK ET AL.

HOMESTEAD RIGHT, PARTIES TO ACTION ON.—In an action against the husband alone, the homestead-right cannot be determined. Both parties must be before the Court.

IDEM.—RIGHT OF APPEAL.—The husband has not even the right of appeal in such a case, as the judgment could not affect the question of homestead.

APPEAL from the District Court of the Twelfth Judicial District, City and County of San Francisco.

The defendant, John Revalk, on the 11th day of December, 1854, alone executed a mortgage to the plaintiffs, Kraemer and Eisenhardt, to secure the payment of a promissory note, of *four thousand dollars. Before, and at the time [75] of the execution of the mortgage, Revalk and wife resided upon the premises. The plaintiffs brought their suit against John Revalk, to foreclose the mortgage, and defendant Jollix was made a party, as having subsequently acquired an in-

1. Approved, *Cook v. Klink*, post 353; cited *Larson v. Reynolds*, 13 Iowa 583. See *Revalk v. Kraemer*, ante 66 and note.

terest in the property. John Revalk appeared, and admitted the execution of the note and mortgage, but claimed the whole premises as his homestead. The Court decreed the premises to be sold, with the exception of a portion set apart as a homestead, and the defendant John Revalk appealed. The defendant Jollix made no appearance in the Court below.

Pixley & Smith, and Aldrich, for Appellants.

Sydney V. Smith, for Respondents.

BURNETT, J., delivered the opinion of the Court—MURRAY, C. J., concurring.

The question necessary to dispose of this case, was decided in the case of *Revalk v. Kraemer*, ante 66. The judgment in this case did not affect either Revalk or his wife, so far as the question of homestead was concerned, and he alone had no right to appeal. Unless both husband and wife were before the Court, no notice should have been taken as to the question of homestead.

For this reason, the appeal must be dismissed.

VAN REYNEGAN v. REVALK ET AL.

HOMESTEAD, FORECLOSURE OF MORTGAGE ON.—Where, after judgment of foreclosure had been taken in an action against the husband solely, on a mortgage on the homestead premises, executed by him alone, the husband and wife joined in a mortgage to a third party: *Held*, that the foreclosure bound no one as to the homestead, and that the second mortgage was absolute as against the homestead.

IDEM.—EFFECT OF WIFE'S DECEASE.—The wife's decease before the second mortgage was recorded, does not impair it as against a void mortgage.

APPEAL from the District Court of the Fourth Judicial District.

John Revalk, one of the defendants, was the owner of certain premises, and while thus the owner, was married in September, 1854. He and his wife resided upon the premises from the time of their marriage until her death. On the 11th of December, 1854, John Revalk, alone, executed a mortgage to defendants, Kraemer and Eisenhardt, for four thousand dollars. K. and E. instituted proceedings in the District Court against John Revalk, to foreclose the mortgage, and on the 17th of June, [76] 1856, *obtained a decree for the sale of the mortgaged premises, except a portion set apart by the Court, upon the application of John Revalk, as a homestead. Pixley and Smith were attorneys for John Revalk in that action. After the decree was entered, and on the 9th of July, 1856, John Revalk and wife executed a mortgage to Pixley and Smith for one thousand dollars, upon the property decreed to be sold. Mrs. Revalk died on the 10th of October, 1856, and the mortgage of Pixley and Smith was recorded on the 11th. Pixley and Smith assigned this mortgage to plaintiffs on the 7th of

January, 1857, and this suit was brought to foreclose the same. John Revalk made no defense; but defendants, Kraemer and Eisenhardt, whose mortgage was recorded on the day of its date, appeared, and claimed a priority for their mortgage over that of plaintiff. The Court decreed that the mortgage to Kraemer and Eisenhardt had priority, and the plaintiff appealed.

Pixley & Smith, for Appellant.

Sidney V. Smith, for Respondents.

BURNETT, J., after stating the facts, delivered the opinion of the Court—MURRAY, C. J., concurring.

The questions arising in this case have been decided by this Court in the cases of *Revalk v. Kraemer*, ante 66, and of *Dorsey v. McFarland*, 7 Cal. 342.

The property being the homestead, the mortgage to Kraemer and Eisenhardt was void, and could not be rendered valid by the subsequent death of the wife. The proceedings in the case of Kraemer and Eisenhardt, in the Twelfth District Court, did not bind either Revalk or his wife, as to their right of homestead. They had the right to mortgage or sell in the same way as if those proceedings had not been instituted. Pixley and Smith had a right to take their mortgage. Their failure to record until after the death of Mrs. R., could, in no wise, impair their rights as against a void mortgage.

The judgment of the Court below is reversed, and that Court will enter a decree for the plaintiff.

FEILLETT v. ENGLER.

1. JUDGMENT BY CONFESSION, WHEN VOID.—Judgment, by consent or confession, for over two hundred dollars, in a Justice's Court, is void. Consent of parties cannot give jurisdiction which the Constitution denies.

APPEAL from the District Court of the Eleventh Judicial District, County of Placer.

*This was an action of ejectment. The defendant admits all the substantial allegations of the complaint, but claims title by virtue of a purchase at a constable's sale, upon execution issued by a justice of the peace, against the plaintiff, for the sum of three hundred and eighteen dollars. The docket of the justice shows that suit was originally commenced for the sum of two hundred dollars, but that the present plaintiff, then defendant, appeared and confessed judgment for three hundred dollars, whereupon judgment was duly entered for three hundred dollars, and eighteen dollars costs. [77]

The Court below rendered judgment for defendant, and the plaintiff, Feillett, appealed.

Chas. A. Tuttle, for Appellant.

James Anderson, for Respondent.

MURRAY, C. J., after stating the facts, delivered the opinion of the Court—TERRY, J., concurring.

We have repeatedly decided, that justices of the peace cannot entertain suits for money demands where the amount in controversy exceeds two hundred dollars. Consent of parties cannot give a jurisdiction which the Constitution denies. It makes no difference whether the judgment was suffered voluntarily or not. It was for all purposes absolutely void, and the execution and sale under it a nullity.

Judgment reversed, and cause remanded.

PARKE v. KILHAM.

ACTION FOR DIVERSION OF WATER.—Actions for the diversion of waters of ditches, are in the nature of actions for the abatement of nuisances, and may be maintained by tenants-in-common in a joint action.

WATER RIGHTS, DILIGENCE REQUISITE.—The line upon which a ditch is actually intended to be dug, should be run within a reasonable time after the line of preliminary survey has been run, in order to make the right of the ditch-owners date back to the survey. What is a reasonable time must depend upon the circumstances of the case.

IDEM.—ESTOPPEL.—Where a party stands by and sees a ditch-owner appropriate the water of a creek to his own use, at a great expense, and does not inform him of his claim to the waters, he and his vendees are estopped from afterwards claiming the water.

NUISANCE, WHAT IS.—To turn aside a useful element from premises is as much a nuisance as to turn upon them a destructive element.

IDEM.—DITCHES, WHEN NUISANCES.—A ditch, to carry off water rightfully flowing to a mining-claim, is as much a nuisance as a dam to flood it.

APPEAL from the District Court of the Fifth Judicial District, County of Amador.

On rehearing. Parke and Struck, the plaintiffs in the [78] Court *below, brought this action to recover from defendant the use of the waters of the middle fork of Jackson creek, and for damages, alleging a priority of right thereto. The answer of defendant denied plaintiffs' priority, and claimed an exclusive right to the use of the waters of that stream. The testimony showed that plaintiffs' grantors, about the 1st of December, 1852, located a mining-claim on the creek, at a place called Elliott's Ranch, and in order to work it erected a small dam in the creek and turned a portion of the water into their claim, for mining purposes.

That in October, 1852, the grantors of defendants projected a line of ditch, by drawing a base line from the lower end thereof to a point on the creek some distance below Elliott's Ranch, where they designed erecting their dam, and at the same time put up notices on the creek of their intention to use and appropriate the waters thereof in their contemplated work.

That in the spring of 1853, when the ditch was nearly complete, they changed the upper part thereof so as to take the water out of the creek about one hundred rods above the mining-ground occupied by plaintiffs' grantors.

That in doing this, they ran the ditch through the Elliott Ranch, and paid Elliott, who was one of plaintiff's grantors, a small sum for the right of way, and agreed to give him some water for irrigating purposes. There was some testimony going to show that plaintiffs' grantors had witnessed the appropriation of the water by defendant's grantors, and had acquiesced therein.

On the trial, defendant's counsel asked the Court to instruct the jury "that if those from and through whom the plaintiffs claim had the prior right to the waters in the middle fork of Jackson creek, 'and they stood by and saw' those from whom defendant derives his title to the ditch, and the right to the waters of the said creek, appropriate the water of the creek, at a great expenditure of money and labor, under the mistaken idea that the defendant's vendors were obtaining the first appropriation, and did not inform them of the mistake, that they, plaintiffs' vendors, and the plaintiffs, who claim under them, are estopped from setting up their prior right at this time." This instruction the Court refused to give, and defendant excepted.

Plaintiff had a verdict for a small money judgment and for one hundred inches of water. The defendant moved for a new trial, which being denied, he appealed.

Robinson, Beatty & Bolts, for Appellant.

Smith & Hardy, for Respondents.

BURNETT, J., delivered the opinion of the Court—MURRAY, C. J., concurring.

This case was decided at the last April term of this Court, and *a re-argument had at the present time. We [79] are satisfied, upon a more full argument and a more careful consideration of the case, that the judgment of the Court below should be reversed, and a new trial had. The learned counsel for the defendant insists that we did not correctly understand him, when we said, in a former opinion, that "this position is based upon the idea, that the proper point could not be designated with certainty by a proper survey, but must be determined by the actual construction of the ditch."

Taking the language of the brief in connection with the facts as proved, we did so understand the counsel. It was proved by Cunningham, one of defendant's witnesses, that "the base line was run for the purpose of determining where the ditch would strike the creek. This point was ascertained by starting at the upper end of the base line, and leveling up the creek far enough to allow the ditch a sufficient declivity, which we did in October, 1852, and we placed our notice of claim of water at this point

on the creek above the end of the base line." "It was not until the spring of 1853, that we thought of adopting the upper line, on which we dug the ditch."

This statement of the witness is very explicit, and shows that the point where the notice was placed, was intended as the upper terminus of the ditch. This being true, the argument of the learned counsel would hardly be applicable to the facts proved, unless taken as we understand it. We, however, cheerfully make the correction.

It is, undoubtedly, true, that a base line is generally first run from the point where the water is to be used, to the stream from which it is proposed to be taken. This line is run upon a level, and the object is to ascertain the fact, whether the water in the stream can be made to flow to the point where it is intended to be used. The line upon which the ditch is actually intended to be dug, should afterward be run within a reasonable time, which must depend upon the circumstances of each particular case.

The instruction offered by the defendants, we now think, was substantially correct, and should have been given.

There was a point made by the defendant which we did not notice in our former opinion. It is insisted that there is a misjoinder of parties plaintiffs, as they were tenants-in-common, and should have brought separate suits for the restitution of the water. In the case of *DeJohnson v. Sepulbeda*, 5 Cal. 149, it was held that "for injuries to their common property, as trespass, *quare clausum fregit*, or nuisance, etc., tenants-in-common should all be joined, but they must sue severally in real actions, generally, as they have separate titles." See also *Throckmorton v. Burr*, 5 Cal. 400.

The injury complained of in this case, is in the nature of a nuisance. It is very similar to the obstruction of ancient [80] lights. *To turn aside a useful element from the premises, is as much a nuisance, as to turn upon them a destructive element. In both cases, the injury may be equally material. A ditch, to carry off water, rightfully flowing to a mining-claim, is as much a nuisance as a dam to flood the premises.

For these reasons, the plaintiffs properly brought their suit jointly. It would have been error for them to have sued separately. The judgment of the Court below is, therefore, reversed, a new trial ordered, and the cause remanded for further proceedings.

STEWART v. SCANNELL.

18 STATUTE OF FRAUDS—POSSESSION REMAINING IN VENDOR.—A sale of merchandise by bill of sale, the goods remaining in the possession of the vendors as warehousemen at a regular charge, and their receipt given for the goods on storage, the vendors doing business as commission merchants, and sometimes receiving goods on storage, is void as to the creditors of the vendors.

IDEM.—CHANGE OF POSSESSION REQUISITE.—The absence of any fraudulent intent will not take the case out of the statute. There must be an actual and continued change of possession, or the sale is void as to creditors.

APPEAL from the Superior Court of the City of San Francisco.

The plaintiffs bought forty-five barrels of whisky of Messrs. Lowe, Ebbetts & Co., who were commission merchants, and sometimes received goods on storage. At the time of the purchase, the plaintiffs received from Lowe, Ebbetts & Co. a bill of sale for the whisky, and a warehouse-receipt for it, to remain with the vendors on storage at fifty cents per barrel. No change was made in the position of the whisky in the warehouse at the time of the sale or afterwards, by the plaintiffs, and no delivery made or change of possession except what passed by the receipt and bill of sale. While the goods remained with Lowe, Ebbetts & Co. they were attached by the sheriff, at the suit of *Robertson v. Lowe, Ebbetts & Co.*, who recovered judgment against them for more than three thousand dollars. The plaintiffs brought their suit to recover the whisky. Judgment was given for the defendants, and the plaintiffs appealed.

J. A. McDougall and *W. G. Morris*, for Appellants.

The cause went to trial, and a special verdict was rendered, ascertaining: First—that Stewart & Co. purchased the whisky of Lowe & Ebbetts, and paid the price. Second—that Lowe & Ebbetts did jobbing, commission, and storage business. Third—that Lowe & Ebbetts gave Stewart & Co. a receipt and a warehouse-certificate. Fourth—that the whisky remained with Lowe & Ebbetts, as warehousemen, on storage, at the rate of *fifty cents per month per barrel, without further change [81] of possession.

In *Atkins v. Barwick*, 1 Stra. 167, FORTESCUE, J., says: "Property, by our law, may be divested without an actual delivery, as of a horse in a stable." The common law rule is well discussed in 1 Parsons on Contracts, 440, *et seq.*, and notes. In volume second of the same work, page three hundred and twenty, it is said, that at "common law, if the seller makes a proposition, and the buyer accepts, and the goods are in the immediate control and possession of the seller, and nothing remains to be done but to identify them, or in any way prepare them for delivery, the sale is complete, and the property in the goods passes at once and immediately."

1. Approved *Fance v. Boynton*, post 561; *Bacon v. Scannell*, 9 Cal. 273; *Stanford v. Scannell*, 10 Cal. 9. Substantially overruled in *Stevens v. Irwin*, 15 Cal. 503; *Godchaux v. Mulford*, 26 Cal. 323. See *Whitney v. Stark*, post 514.

The statute of 13 Elizabeth first made the want of delivery or transfer of possession evidence of fraud; afterwards, the statute of 29 Charles II., called the statute of Frauds and Perjuries, in express terms, required, in order to sustain an action, both delivery and purchase. (See 2 Parsons, 320.)

Under the provisions of these statutes, the provisions of which, in substance, have been incorporated into the statutes of all the States except Louisiana, what constitutes in fact a delivery and change of possession, has been a continual subject of discussion. 2 Pearsons on Contracts, 323-4, (a work of the highest authority,) abstracts the rule as follows:

"It may be said, in general, that a delivery must be a transfer of possession and control, made by the seller, with the purpose and effect of putting the goods out of his hands. This is a sufficient delivery, whatever its form. Hence, it may be constructive, as by the delivery of the key of a warehouse, or making an entry in the books of a warehouse-keeper, or delivery with endorsement of a bill of lading, or even of a receipt, or without even such as this, where the goods are bulky and difficult of access, as a quantity of timber floating in a boom, or a mass of granite, or a large stack of hay."

The cases cited in the notes to the foregoing text, give the entire law upon the subject.

A transfer and delivery by symbol, or the muniment of title and right, is the only mode whereby "immediate delivery" can be made of a large class of personal property, and indeed of most of the property which is the subject of commerce. In many cases where it is possible it would involve an inconvenience which would be almost destructive of commercial enterprise.

Bennett v. Goddard, 3 Mas. 111, is a case where the vendor sold fifty-one bales of cotton in his own warehouse, and in consideration of the purchase agreed that the cotton should remain rent free, for a certain time. The vendor became insolvent, and the question arose as to the sufficiency of the sale. In this case,

STORY, J., says: "The principle question in cases of this [82] sort, is *to ascertain whether there has been an actual or constructive delivery. The latter is just as effectual as the former, and may be inferred from circumstances, as well as established by direct proof." After discussing the authorities, the Judge proceeds to say: "There was a complete delivery of the cotton to Ballard. Nothing remained to be done on either side." * * * "Neither party contemplated any further act to be done." He further proceeds to say: "There is nothing in reason or principle to make the present case different; simply because the bales of cotton remained in plaintiff's own warehouse. It was a part of the bargain that they should so remain, and a part of the consideration of the purchase. The warehouse must be deemed, after the purchase, to be virtually the warehouse of Ballard (vendee) for this purpose, or for so much storage as was virtually hired by him."

In conclusion: The appellants insist that there was a perfect sale; that there was a constructive delivery, which vested in appellants a perfect title; that by his delivery appellants became actually possessed, and had the entire right to and power over the property in question, that, therefore the appellants were not within our Statute of Frauds, and had a perfect right to recover upon the special verdict in the Court below.

Williams, Shafter & Park, for Respondent.

This action is only one of a legion of cases in which Courts have been called upon to make a practical application of the principle, that a vendee of personal property must assume at once all external *indicia* of title, in order to protect himself against the creditors of the vendor. So fully is this principle recognized in this country, that it is believed that the only substantial difference existing in the various States is, as to the conclusiveness of the presumption of fraud, arising from the failure of the vendee to take possession. In this State the statute stands upon the extremest rule of caution and promptitude. The sale must be "accompanied by an immediate delivery, and be followed by an actual and continued change of possession."

In *Fitzgerald v. Gorham*, 4 Cal. 289, this Court adopted the same rigorous rule. Neither *bona fide* nor constructive possession in the vendee will protect him, but his outward act of actual possession must accompany his good faith.

It was submitted that it was the express object of the State of California, to go to the extreme limit, and to avoid the uncertainty of the decisions upon this branch of the law.

There are no circumstances which can by any possibility take this case out of the rule; the plaintiffs had done no act whatever amounting to, or looking toward an actual possession of the property sold; but on the contrary, their warehouse-receipt from their vendors, in terms, states that the property was left by plaintiffs in the possession and control of the vendors. [83]

BURNETT, J., after stating the facts, delivered the opinion of the Court—TERRY, J., concurring.

The only question presented by the record, is, whether the sale was void, as against the creditors of Lowe, Ebbetts & Co., under the provisions of the fifteenth section of our Statute of Frauds, which requires the sale to be "accompanied by an immediate delivery, and be followed by an actual and continued possession of the property sold." (Com. L. 201.)

The language of the statute is exceedingly strong, and the intention manifest. The change of possession from the vendor to the vendee, must not only be actual, but also continued. The object of the statute being the prevention of fraudulent sales of goods, no means more simple and efficient could have been adopted to have accomplished the end intended, than that re-

quiring this actual and continued change of possession. It takes away from the parties the means of carrying out their fraudulent intent, and removes the temptation. As the fraudulent vendor cannot remain in possession, under any pretense whatever, he is compelled to trust entirely to the fidelity of the fraudulent vendee. But, if by arranging proper bills of sale, warehouse-receipts, or other papers, the vendor was permitted to retain possession in any capacity whatever, the rigid provisions of the statute would be practically useless. In such case, as a fraud cannot be presumed, but must be proved, the creditor would not, in most instances, have any means of protection left. The transaction would look fair upon its face, while the actual power of proof would be taken away.

The present case falls within the principle settled by this Court in the case of *Fitzgerald v. Gorham*, 4 Cal. 289. In that case, as in this, there was no actually fraudulent intent. But the Court held that "it was the very case upon which the statute intended to operate."

The statute makes certain facts conclusive evidence of fraud, and whatever may or may not be the actual intention of the parties, if the actual facts exist which are contemplated by the law, the sale is void. In the case referred to the vendor was only employed in the capacity of a clerk, at a monthly salary. The goods were as much under the actual control of the vendees in that as in this case. The two cases are the same in principle. In one case, the vendor afterwards had possession of the property, as clerk, and in the other, as warehouseman. In both, the vendors were but agents or servants of the vendees, but in both they had the actual possession that renders the sale void as against creditors, while good as between themselves. In [84] the *present case, the change of possession of the whisky was only constructive, and not actual.

Judgment affirmed.

FEENY v. DALY

CONSIDERATION, SUFFICIENCY OF FOR EXPRESS PROMISE.—Where an insolvent, after his discharge, expressly promises his creditor to pay his debt, it can be enforced, the debt being a sufficient consideration to support the subsequent promise.

IDEM.—A verbal promise is sufficient, as our statute has not changed the common law rule.

APPEAL from the District Court of the Eleventh Judicial District, County of El Dorado.

Feeny sued Daly, in the Court below, on a debt created on the 17th of October, 1854, and alleged that the defendant, on the 8th day of May, 1855, was discharged from the operation of this particular debt, under the Insolvent Law; but that afterwards, to wit: upon the ——— day of June, 1855, the defendant, in consideration of the original indebtedness, promised and

agreed to pay plaintiff the amount of his debt. The case was tried before the Court below, sitting as a jury, who found, as facts, "the existence of the indebtedness," as alleged by plaintiff; the discharge of the defendant therefrom, under the Insolvent Law, and his subsequent "express verbal promise to pay the debt," on which finding, judgment was rendered for plaintiff, from which this appeal was had.

McKune, Johnson & Ankeny, for Appellant.

Our Insolvent Law (Comp. Laws, 317, Sec. 24), provides that "the debtor shall be released and fully discharged from any and all debts then contracted, etc., and from every judicial proceeding relative to the same."

The words "release" and "discharge," are words of broad and well-defined meaning, analogous to, and co-extensive with, payment. Thus, a debt may be discharged by payment, by lapse of time, or by proceedings in insolvency; and, within the meaning and purview of our Statute of Limitations and Insolvent Act, the debtor, after such discharge, is as free from the debt and all subsequent liability thereon, as if he had actually paid the same; and nothing less than an express agreement in writing, signed by the party to be charged, ought to be held sufficient to revive the debt again.

Sanderson & Hewes, for Respondent.

Admitting that the defendant was released from the debt by his discharge in insolvency, was the subsequent promise founded upon a sufficient consideration?

*The thirtieth section of the Insolvent Act, Comp. [85] Laws, 320, taken in connection with the construction placed upon it by this Court, in *Woods v. Barrett*, July Term, 1855, we think fully answers the first question in favor of the respondent.

"The debt of an insolvent or bankrupt is due in conscience, notwithstanding his discharge. He may, therefore, revive the old debt by a new promise, and the old debt will be a sufficient consideration." (*Scouton v. Eislord*, 7 Johns. 36.)

In support of the doctrine of that case, we refer to *Irwin v. Sanders*, 1 Cow. 229; *Huppy v. Henderson*, 14 Johns. 178; *Maxim v. Morse*, 8 Mass. 127; *Turner v. Chrisman*, 20 Ohio, 332; *Womach v. Womach*, 8 Tex. 397; *Otis v. Gaylin*, 31 M. (1 Red.) 567; *Stark v. Stinson*, 3 Fost. N. H. 259; *Comfort v. Eisenbeis*, 11 Penn. 17. The above cases are all directly in point.

Chancellor Kent, (2 Kent's Com. 465, and note,) discusses the principle for which we here contend, and seems to recognize it as now established beyond controversy, viz., that a moral obligation is sufficient to support an express promise, where a good and valuable consideration has once existed.

The English authorities to the same point are summed up in a note to 3 Bos. & P. 249, which is referred to, and approvingly cited, by Spencer, J., in 13 Johns, 258.

The promise need not be in writing, because no statute requires that it should be so, etc.

TERRY, J., delivered the opinion of the Court—BURNETT, J., concurring.

The debt of an insolvent bankrupt is due in conscience, notwithstanding his discharge, and is a sufficient consideration to support a subsequent express promise to pay.

A verbal promise is sufficient at common law, and there is nothing in our statutes which changes the rule.

Judgment affirmed.

HOPKINS v. DELANEY ET AL.

ACKNOWLEDGMENTS, WHO MAY TAKE.—The recorder of the city of San Francisco is authorized by law to take acknowledgments of mortgages and conveyances.

¹ **IDEM.**—**CERTIFICATE SUFFICIENT.**—Where the officer taking an acknowledgment certifies that the parties "were known to him," and omits the word "personally," it is valid.

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

This was a bill brought for the foreclosure of various mortgages, on the homestead of the defendants, Delaney and wife.

[86] *The decree in the Court below, in favor of plaintiff and the other incumbrancers, from which this appeal is taken, by Delaney and wife, was based upon mortgages that were respectively acknowledged in the following manner, and before the various officers certifying to them:

STATE OF CALIFORNIA, }
County of San Francisco. } ss.

On the 18th day of December, 1854, before me, R. H. Waller, recorder of the city of San Francisco, personally came Matthew Delaney, and Mary, his wife, known to me to be the persons described in, and who executed the within mortgage, and severally acknowledged that they executed the same freely, and voluntarily, for the uses and purposes therein mentioned. And the said Mary, on a private examination by me, after being made acquainted with the contents, out of the presence of her husband, and out of his hearing, acknowledged that she executed the same freely, and without compulsion, fear, or undue influence from her husband, and that she did not wish to retract the execution of the same.

Given under my hand, at the city of San Francisco, the day and year aforesaid.

R. H. WALLER, City Recorder.

1. Cited *Overman S. M. Co. v. American M. Co.*, 7 Nov. 318. See *Bryan v. Ramirez*, post 461.

STATE OF CALIFORNIA,
County of San Francisco. } ss.

On this 7th day of April, 1853, before me, came Matthew Delaney, and Mary, his wife, to me known to be the individuals described in, and who executed the within instrument, and acknowledged that they executed the same of their own free act and deed, and for the purposes therein mentioned. And the said Mary, after being informed of the contents, on a private examination by me, separate and apart from, and out of the hearing of her said husband, acknowledged that she executed the same freely, and without fear or compulsion of or from her husband, or other undue influence from him, and that she did not wish to retract the execution thereof.

In witness whereof, I have hereunto set my hand and seal, the day and year just above mentioned.

[L. s.]

H. L. DODGE, Notary Public.

STATE OF CALIFORNIA,
County of San Francisco. } ss.

On this 9th day of January, 1855, before me, G. J. Hubert Sanders, a notary public in and for said county, duly commissioned and sworn, dwelling in the city of San Francisco, personally appeared Matthew Delaney, and Mary, his wife, known to me to be the individuals described in, and who executed the an-nexed instrument, and acknowledged that they [87] executed the same freely and voluntarily, for the uses and purposes therein mentioned. And the said Mary Delaney, having been first by me made acquainted with the contents of said instrument, acknowledged to me, on examination had separate and apart from, and without the hearing of, her husband, that she executed the same freely, and without fear or compulsion, or influence of her husband, and that she did not wish to retract the execution of the same.

Witness my hand and official seal.

[L. s.]

G. J. HUBERT SANDERS, Notary Public.

Judah, for Appellants.

Waller & Osborne, and S. M. Bowman, for Respondent.

MURRAY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

The plaintiff filed his bill to foreclose two mortgages. The defendants set up a claim of homestead.

The only questions raised by the record are: First, whether the recorder of San Francisco was authorized by law to take acknowledgments of conveyances, which authority is expressly given by statute; and, second, whether the acknowledgment is sufficient. The officer certifies that the parties were known to him; the appellant contends that the word "personally" should have been used. We have before decided that such a certificate was sufficient. The points on which the appellant relies are frivolous, and the appeal was evidently taken for delay.

Jugment affirmed, with ten per cent. damages.

BELDEN *v.* HENRIQUES.

¹FRAUD, FROM WHAT MAY BE INFERRED.—Fraud may consist in the misrepresentation, or the concealment of material facts, and may be inferred from the circumstances and condition of the parties contracting.

IDEM.—WHAT MUST BE PROVED.—In order to sustain the allegations of fraud and deceit in contracting a debt, it is necessary to prove that the representations alleged to have been fraudulent and deceitful, were not true.

APPEAL from the Superior Court of the City of San Francisco.

Tabitha Belden commenced this action against defendant to recover the sum of eight hundred and ninety-five dollars and interest, which she alleged that she had been induced by the false and fraudulent representations of defendant, to the effect that he was a man of extensive business relations, etc., to place in his hands, to be invested by him for her, so that it would [88] produce *her the sum of three per cent. per month, which said money he had afterwards given his note to her for, and never paid, except the sum of twenty-five dollars. She also, at the commencement of the suit, caused the defendant to be arrested and held to bail. The case was submitted to the jury on the following charge of the Court, refusing the one asked by defendant, on the ground that the charge included it:

“That the question for them to decide was, whether the defendant was guilty of fraud in procuring the money from the plaintiff.

“It is the province of the jury to determine under the evidence, whether the defendant obtained the plaintiff’s money by deceitful and fraudulent representations. The jury should take into consideration the character of the parties, the means used, and all the circumstances; and if they shall believe from the evidence, that the defendant obtained the money by falsely representing to her that he would keep it safely for her; and that she let him have it, relying on the truth of these representation; and that the representations were untrue; and that the defendant owes her the money, and refuses to pay it; and has given no sufficient excuse or explanation of his conduct in the premises; then the defendant is guilty of deception and fraud, and the jury should so find. But on the contrary, if the jury believe from the evidence, that the defendant did not use fraudulent means to obtain the money, they should not find the fraud against him, but only an ordinary verdict for the money actually due.”

The jury found the defendant guilty of fraud, and also found the amount of the debt.

Judgment being entered on the verdict, the defendant moved for a new trial, which being denied, he appealed from the order refusing the new trial, and from so much of the judgment as stated the fraud.

John V. Wattson, for Appellant.

S. M. Bowman, for Respondent.

MURRAY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

This was an action to recover a certain amount of money, alleged to have been fraudulently obtained from the plaintiff. The defendant admitted the debt, but denied the fraud. The case went to the jury upon this question alone, and they returned a verdict that "the defendant was guilty of deception and fraud in contracting the debt." The appellant contends that the evidence is insufficient to justify the finding.

Fraud may consist in the misrepresentation, or the concealment of material facts, and may be inferred from [89] the circumstances and condition of the parties contracting. The evidence in this case was sufficient to warrant the jury in finding the fact of fraud, and we see no good reason for disturbing their verdict.

The appellants assign as error, the refusal of the Court to charge the jury "that the plaintiff, to sustain the allegations of fraud and deceit in contracting the debt as set forth in the complaint, must prove on the trial, that the representations alleged to have been fraudulent and deceitful, were not true."

This instruction was undoubtedly correct, but was refused by the Court, on the ground that it had been already substantially given by the Court. A reference to the instructions of the Court, shows that such was the fact, and the verdict establishes the conclusion, that the jury were not misled by the refusal.

Judgment affirmed.

PEOPLE v. DOMINGO QUINCY.

¹ CONTINUANCE—WHAT MUST BE SHOWN.—Affidavits for continuance should show that the facts, expected to be proved by the absent witnesses, cannot otherwise be proved.

APPEAL, LEGAL INTENDMENT ON.—In the absence of the testimony taken in the case, every legal intendment is in favor of the action of the Court below.

APPEAL from the District Court of the Tenth Judicial District, County of Sutter.

Jesse O. Goodwin, for Appellant.

W. T. Wallace, Attorney-General, for Respondent.

MURRAY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

The appellant was indicted and convicted of murder. The grounds of reversal relied on are:

1. The refusal of the Court below to grant a continuance, and,

1. Cited *People v. Gaunt*, 23 Cal. 156; *People v. Williams*, 24 Cal. 38.

2. Error in giving and refusing instructions.

The motion for a continuance was properly overruled—the Court assigning as a reason therefor: “That the defendant had used no diligence to procure the attendance of his witnesses, and had not applied for an order of the Judge to compel the attendance of witnesses living out of the county, until the evening before the trial was to take place.” In addition to this, it may be observed that the affidavit is fatally defective in another particular, viz: it does not state that there are no other witnesses by which the same facts can be proved.

The instructions are substantially correct. The appellant, *however, contends that the Court erred in instructing the jury that “it was unnecessary for them to consider the law in relation to manslaughter, as the prisoner was either guilty of murder or nothing at all.” The evidence has not been preserved, and it is impossible for us to say the Court erred in giving this charge. In the absence of the testimony, every legal intendment is in favor of the ruling of the District Judge.

Judgment affirmed, and the Court directed to fix a day to carry the sentence into execution.

PEOPLE v. MOORE.

¹ **MURDER, IN FIRST DEGREE.**—On a trial for murder it is not error to instruct the jury that if the killing was the result of deliberation, no matter for how short a period, it would be murder in the first degree, under our statute; where the evidence was sufficient to warrant the jury in finding the fact, that the killing was deliberate and premeditated.

¹ **IDEM.**—**MALICE ESSENTIAL.**—There can be no murder without malice, either express or implied.

NEW TRIAL—INSUFFICIENT GROUNDS.—Where the Court erroneously defined the crime of murder in the first degree, in its charge to the jury, but in a subsequent instruction clearly and correctly defined it, the erroneous ruling is not a sufficient ground for a new trial.

² **ERROR IN INSTRUCTIONS.**—A mere want of perspicuity in an instruction to a jury, which does not injure the prisoner, if erroneous, is not sufficient ground for a reversal of the judgment. The objection must go to this extent, that the instruction is wholly erroneous, or susceptible of different and doubtful constructions.

APPEAL from the District Court of the Fourteenth Judicial District, County of Nevada.

F. Moore, the defendant, was convicted of the crime of murder in the first degree, committed on one Alexander McClanahan, on the 21st of February, 1857, and sentenced to be executed. The remainder of the case is sufficiently stated in the opinion of the Court. Defendant appealed.

E. D. Baker, for Appellant.

The first charge given by the Court, at the instance of the

1. Approved, *People v. Bealoba*, 17 Cal. 399.

2. Cited *People v. Butler*, post 441.

District Attorney, was, that "any kind of unlawful, willful, deliberate, and premeditated killing, is murder in the first degree." This is a new definition of murder. No killing is lawful except the executions which take place in pursuance of the judgments of competent tribunals. The statute, which is merely the affirmation of the common law, declares that, "Murder is the unlawful killing of a human being, with malice aforethought, either express or implied."

There can be no murder in any degree without malice. It is the essential ingredient in the crime, and no other words will supply its place. The prisoner could not be convicted of murder under an indictment which charged willfully, unlawfully deliberately, and premeditatedly, killing M., omitting the words, "of *malice aforethought." They cannot be substituted as equivalents, and not equivalents, in legal contemplation. (4 Stephens' Crim. 142.) [91]

The Act of 1856, p. 219, declares, that "all murder which may be perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery, or burglary, shall be deemed murder of the first degree."

This section of the Act of 1856 is only amendatory of the twenty-first section of the Act of 1850, and is to be construed with the nineteenth section of that Act, which defines murder and makes malice the test of the crime. Besides, the Act of 1856 speaks of murder and the degrees of the offense, and goes upon the ground that malice has been already charged and made out.

The instructions, as thus given by the Court, were calculated to mislead the jury. It is apparent that the case was argued and given to the jury under the supposition that the Act of 1856 had changed the common law definition of murder, which is a proposition that cannot be maintained. (4 Stephens, 121, 122.)

The second instruction, given at the instance of the District Attorney, was intended only as a corollary of the first. It assumes that the law fixes no time for deliberation, to constitute murder in the first degree. It declares that "no time is too short for a wicked man to frame in his mind a scheme of murder, and to contrive the means of accomplishing it."

This instruction is equally objectionable in temper and tone, as in law, as applied to the evidence.

The Act of 1856, defining murder in the first degree, never was intended to apply to killing, which was the result of a quarrel or sudden rencontre, when the passions are aroused by an unpremeditated collision.

The statute, in language, is confined to "all murder which shall be perpetrated by means of poison, or lying in wait, torture, etc."

It was intended to be confined to that species of killing in

which the common law conclusively implies malice on account of its calculating wickedness. It is true that the statute adds the words, "or by any other kind of willful, deliberate, and premeditated killing, or which shall be in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree." The first and last clause of the provision shows what species of killing was in the contemplation of the Legislature when it speaks of "any other kind of willful, deliberate, and premeditated killing."

Death which grows out of sudden quarrels and conflicts, was not contemplated to be classed as murder in the first degree. It relates to killing under circumstances which exhibits a heart altogether depraved, which shows a calculation of crime beyond that which results from the ordinary infirmities of human nature, and the sudden ebullitions of temper and passion.

The fourth charge, given at the instance of the government, does not state legal propositions. The first clause is:

"In all cases of homicide, excusable by self-defense, it must be taken that the attack was made upon a sudden occasion, and not premeditated, or without malice."

This part of the charge is so obscure as scarcely to be intelligible.

If the attack alluded to is one made by the deceased party, it is evidently not law. It makes no difference whether his attack was sudden or malicious. The only question is, was it of such a character as reasonably to endanger the life of the prisoner. If yes, he had a right to defend himself to the extent of slaying the assailant to save himself.

The other clause of the fourth instruction assumes that the prisoner must flee as far as he can by reason of some impediment, or by reason of the fierceness of the assault. It does not state the qualification to be found in all the books, that he may take the life of the assailant instantly, if necessary to save his own. The instruction assumes that, to some extent, he must flee or retreat.

An abstract charge, which may mislead the jury, is erroneous. (11 B. Mon. 47.)

———, for Respondent.

MURRAY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

The appellant was convicted of murder in the first degree. On the trial, the Court instructed the jury, "that any kind of unlawful, willful, deliberate and premeditated killing, is murder in the first degree."

The statute of the State (Compiled Laws, 640,) defines murder to be the unlawful killing of a human being, with malice aforethought, express or implied. This is but an enunciation of the common law definition of the crime. Murder is thus de-

fined by Coke: "When a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the King's peace, with malice aforethought, either express or implied."

To constitute the offense it must appear:

1. That the party was of sound mind.
2. That the killing was unlawful; and,
3. That it was done with malice.

Every killing is unlawful, unless done by warrant, or legal excuse, but every unlawful killing is not murder; [93] as for example: if an officer should execute a criminal, before or after the day appointed, or upon a void warrant, this would be an unlawful killing; and also a willful, deliberate, and premeditated killing, but would not be murder, unless the ingredient of malice was established.

There can be no murder without malice, either expressed or implied, and the instruction of the Court, as a legal proposition, was incorrect. At common law, this error would have been a sufficient ground of reversal, but our statute makes it the duty of the Court to examine the whole record, and affirm the judgment, if it shall appear that substantial justice has been done. We are to disregard technicalities, and to determine, from the whole case, whether the prisoner has had a fair trial, and the judgment is correct.

In the subsequent part of the charge of the Court, the law of the case is stated with great clearness and accuracy, and it is impossible to imagine that the jury could have been misled by the first instruction asked by the District Attorney, and afterwards explained by the charge of the Court.

The appellant complains of the second instruction given by the Court, to the effect that the law fixes no time for deliberation, or reflection, to constitute murder; that it may be for a year, month, day, hour, or minute; that if it appeared that the killing was the result of deliberation, no matter for how short a period, it would be murder in the first degree under the statutes of this State; "that no time was too short for a wicked man to frame, in his mind, a scheme of murder, and to contrive the means of executing it."

The Act of April 19, 1856, amendatory of the Act concerning crimes and punishments, passed April 16, 1851, classifies murder under two heads, or grades—murder in the first and second degrees. The twenty-first section provides that "all murder, which shall be perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing," etc., "shall be deemed murder in the first degree." The evident design of the statute, was to distinguish between killing under such circumstances as showed an abandoned and malignant heart, from which the law implied malice, and killing which was unpremeditated, resulting from sudden passion, or from some unforeseen rencontre.

In an ordinary case, where two men quarrel and fight upon

the spur of the moment, for some sudden insult or offense, the party killing his adversary would not be guilty of murder in the first degree, although he was the assailant; because the killing was not the result of previous consideration or design upon his part.

The instruction was not erroneous under the peculiar [94] state of *the evidence in this case; there was sufficient testimony to warrant the jury in finding the fact, that the killing of McClanahan was willful, deliberate, and premeditated. Moore insults him, and attempts to draw his pistol, but is prevented; he then sits down in the store, with his pistol in his hand, expressing his belief that McClanahan would return, and his intention to shoot him if did so (not if he was attacked.) The sequel shows that he made good his threat, without waiting for a word or hostile demonstration. If he had been attacked, he might have defended himself, but the evidence goes very far to establish the fact that he was the aggressor in the last difficulty. Whether he was or not was left to the jury to determine, as well as the fact whether the killing was the result of a willful premeditation and deliberation on his part.

The appellant contends that the fourth instruction asked by the prosecution and given by the Court, is erroneous, for the reason that it is incomprehensible, and therefore calculated to mislead the jury. The objectionable part is as follows: "In all cases of homicide, excusable by self-defense, it must be taken that the attack was made upon a sudden occasion, and not premeditated, or without malice," etc. This, certainly, is somewhat vague and difficult of comprehension at first blush; but on examination, will be found to embody this principle, viz.: that to excuse a homicide, or justify it on the ground of self-defense, the person slaying another must show, among other things, that the killing was done without malice or premeditation in repelling a sudden attack. If there is any error in the instruction, it does not militate against the appellant, and a mere want of perspicuity on the part of the Court below, in framing instructions, is not a ground of reversal. The objection must go to this extent, that they are wholly incomprehensible, or susceptible of different and doubtful constructions.

We have carefully examined all the testimony, as well as the instructions given by the Court, and have come to the conclusion, on the whole, that justice has been done, and that there is no sufficient ground for a new trial.

The judgment is affirmed.

***PALMER v. TRIPP'S ADMINISTRATOR. [95]**

PROMISSORY NOTE—ENDORSE, WHEN UNCONDITIONALLY LIABLE.—When a party, in consideration of a conveyance of land to him, agrees to pay an outstanding note of his vendor, and writes his name on the back of the note as a memorandum of said agreement, at the same time acknowledging his liability: *Held*, that the liability thus assumed is not the conditional liability of an endorser, but a primary and unconditional obligation to pay the note, for which he had received a full consideration.

IDEM.—CONSIDERATION, PROOF OF.—In such case, parol evidence of the deed is admissible to prove consideration for the agreement to pay the note.

APPEAL from the Superior Court of the City of San Francisco.

This was an action in the Court below, brought by W. H. Palmer, as an assignee of one R. B. Smith, against the defendant, as the administrator of William H. Tripp, deceased, to enforce a contract of the following kind, to wit:

Mowry W. Smith, being indebted to R. B. Smith, and unable to pay him in money, proposed to convey to him a farm, in Sonoma county, in payment of the debt, or as security therefor. This being declined, it is agreed between Mowry W. Smith, R. B. Smith, and W. H. Tripp, that Mowry W. Smith shall convey to defendant the farm in Sonoma county, in consideration of which Tripp agrees to pay R. B. Smith, the amount of Mowry W. Smith's note. A few days after this agreement, R. B. Smith met Tripp in the street, and asked him to endorse his name upon the note. Tripp does go and acknowledge that Mowry W. Smith had conveyed to him the Sonoma ranch, in conformity with the agreement, and said that he now was to pay the note.

This claim was presented to the defendant, as administrator, and payment refused. The complaint contains no allegations of demand upon M. W. Smith, the maker of the note, and notice of non-payment to defendant, but states substantially the foregoing matter.

Judgment was rendered for plaintiff. Defendant moved for a new trial, which being denied, he appealed.

C. Temple Emmet, for Appellant.

The complaint does not allege a demand on the maker, or notice of dishonor, to Tripp, the alleged endorser, or to his administrator. Nor did the plaintiff attempt to prove such demand and notice.

On the trial, the plaintiff proposed to prove by the parol testimony of R. B. Smith, a conveyance of land to Tripp as the consideration for his endorsement. To this evidence the defendant objected, because the absence of the deed of conveyance had not been accounted for. But the Court overruled the objection, (to *which ruling the defendant excepted at [96] the time,) and admitted the evidence.

The contract is conditional. Its legal meaning is, that the

endorser will pay, if the maker, upon being demanded, refuses, and he has due notice of such refusal. These are conditions precedent to his liability.

The fact that he has received a consideration does not vary the character of the contract.

The plaintiff below relies on this conveyance to excuse his want of demand and notice. It is the gist of his recovery. Yet how can the Court ascertain that the alleged conveyance was, in point of fact, a consideration, without seeing the deed, or learning its contents.

There may be no paper, even, purporting to be a deed; or it may not be a deed, in legal signification. And certainly, if there be no deed, there is no conveyance, and if no conveyance, there is no consideration.

The rule as to the admission of secondary evidence is imperative. (*McCann v. Beach*, 2 Cal. 25; *Powell's Heirs v. Hendricks*, 3 Cal. 427; *Hensley v. Tarpey*, 7 Cal. 288.)

If it be attempted to fix the defendant's liability on the promise alleged in the complaint, we answer that this promise, if any was contemporaneous with the endorsement, and that no rule is better settled than that antecedent and contemporaneous verbal statements or promises relating to the same subject-matter are merged in the written contract. (Chitty on Contracts, p. 99.)

McDougall & Sharp, for Respondent.

Upon an examination of the record in this cause, it will be seen that the first point made by appellant is based upon a misapprehension as to the cause of action. It is not a suit brought upon an endorsement of Tripp, but upon a contract on the part of Tripp to pay the debt in the first instance.

The complaint and testimony show a primary, direct, and unconditional liability from Tripp to Smith, the payee—not as evidence or as guaranty of payment by the principal, but a contract for consideration, to pay himself.

The plaintiff below was not undertaking to prove the conveyance of any certain land by Mowry W. Smith to Tripp, but a contract by Tripp to pay the indebtedness, and that there was a consideration therefor. This consideration Tripp admitted.

The deed was a mere collateral fact. It was for R. B. Smith to know or inquire into the nature or value of the conveyance made to Tripp; it was sufficient that Tripp was satisfied. To produce this deed could not then be the business of R. B. Smith's assignees.

If produced, it could not have affected the question of liability, one way or another.

[97] *MURRAY, C. J., delivered the opinion of the Court—
TERREY, J., concurring.

The record in this case discloses the following state of facts: Mowry W. Smith, being indebted to R. B. Smith, executed his promissory note for the sum, payable on demand. By an ar-

rangement entered into between the parties, it was agreed that Mowry W. Smith should convey certain real estate to Tripp, who, in consideration thereof, was to pay said note. Some time after the making and delivery of the note, Tripp, at the request of R. B. Smith, the payee, wrote his name upon the back of it, by way of memorandum of said agreement, at the same time acknowledging his liability, and the conveyance which had been made by the payor of the note to meet the same.

The appellants assign two grounds of error: 1. That there is no allegation of presentation of the note to the maker, or notice of non-payment to Tripp. 2. That the Court erred in admitting parol evidence of the deed from Mowry W. Smith to Tripp, the absence of the same not having been satisfactorily accounted for. Neither of these grounds are tenable. The plaintiff does not declare against Tripp as an endorser; he counts upon the original agreement between them, whereby he became primarily and unconditionally liable, and relies upon the endorsement upon the note as a memorandum of said agreement, not as a collateral liability or undertaking, on his part, to pay, in the event that the maker should fail to do so. There was no error in admitting parol testimony of the deed. The plaintiff was not attempting to establish a conveyance of lands from Smith to Tripp, but an agreement, on Tripp's part, to assume the note, the consideration of which was a conveyance, which Tripp admitted. If the deed had been produced, it is difficult to perceive how it could have affected the liability of the defendant, as he had already acknowledged its sufficiency, and assumed the payment of the note upon the strength of it.

Judgment affirmed.

PEOPLE EX REL. BENHAM v. WILLIAMS.

STATUTORY CONSTRUCTION, APPROPRIATIONS FROM COUNTY FUNDS.—The Act authorizing the county recorder of Yuba county to be paid out of the county treasury, for certain specified services, contains no words which raise the presumption that he was to be allowed a preference over other creditors.

IDEM.—Every appropriation, in the contemplation of law, is to be paid in money.

IDEM.—**ACCRUING REVENUE.**—Though the Legislature can make such disposition of accruing revenue as it deems proper, a construction of a statute which would impair the rights of third parties will always be unwillingly adopted, in the absence of express words to that effect.

APPEAL from the District Court of the Tenth Judicial District, County of Yuba.

*Benham, the relator, having transcribed the records [98] of Yuba county, in conformity with a law passed, authorizing the same, and providing a way of payment therefor, presented his claim to the supervisors, who audited and allowed the same, and directed the treasurer to pay the amount thereof, in cash. The bill was duly presented to the treasurer, who re-

fused payment, on the ground that the cash on hand must be applied to the outstanding warrants, issued prior to the claim of relator, who thereupon sued out an alternative writ of *mandamus* against the defendant, to show cause why he should not pay relator, and thereby comply with the order of the supervisors.

On the return of the writ, it was shown that the cash on hand was sufficient to pay the claim of the relator, collected from the taxes of 1856, but that warrants, drawn for the years 1854 and 1855, to a much larger amount, were outstanding, which had been registered, and payment refused, for want of funds, a long time previous to the presentment of relator's claim. The Court ordered the peremptory writ to issue, from which judgment defendant appealed.

Bryan & Wilkins, for Appellant.

A *mandamus* will not lie against a county treasurer, who refuses, without cause, to pay money ordered by a board of supervisors to be paid, (this case,) as he is liable to an action at law, by the party aggrieved. (2 Cow. 444; 6 Hill. 244; 2 Hill. 45, 46; Monell's Pr. 233, 234; *People ex rel. Draper v. Noteware*, Cal. Jan. T. 1857.)

The Court, if correct as to the right to issue in the cause, erred in ordering the writ to issue: because there were no moneys in the treasury, except what belonged to the "general fund," and there were outstanding warrants for large amounts of money, and largely more than enough to cover the money in the treasury, which had been regularly presented for payment, and payment had been regularly refused, for want of funds; and which had been duly registered according to law, a long time prior to the issuance of the order of the board of supervisors in this cause.

This point has been decided over and over again, by this Court, and the following are a portion of the decisions, all going to show that, under our statutes, he who is first in registration of his warrants, has the first right to the moneys in the treasury. (*Taylor v. Brooks*, 5 Cal. 332; *McCall v. Harris*, 1856; *Laforge v. Magee*, 6 Cal. 650.)

Stephen J. Field, for Respondent.

The facts of the case are briefly these: In April, 1856, the Legislature passed an Act authorizing and requiring the recorder of Yuba county to transcribe certain records of the [99] county *into a new set of books. By the third section of this Act, it is provided that the recorder shall receive for his services, "pay out of the county treasury at the rate of twenty cents per folio of one hundred words, and he shall be allowed no further compensation whatever for services under the Act." (Laws of 1856, p. 140, secs. 1, 3.)

For other services as recorder, in recording instruments and for copies, he is allowed by the general fee bill just double the sum allowed by this Act, being forty cents a folio. (See Fee Bill, Laws of 1855, p. 83.)

In pursuance of the requirements of the Act of April, 1856, the recorder proceeded and transcribed the records mentioned therein, and presented his bill for his services to the board of supervisors of Yuba county, on the 7th of February, 1857, for allowance, and the same was allowed as a cash bill, and the treasurer was, by order of the said board of that date, directed to pay the sum of one thousand five hundred and seventy-four dollars and sixty-five cents to the relator.

The following facts were admitted: That the funds in the hands of the treasurer of the county at the time the relator demanded payment of his bill, and the issuance of the alternative writ, were funds collected from the taxes of 1856, under the head of general purposes, according to an order of the board of supervisors of that year. That there were outstanding warrants drawn in the years 1854 and 1855 upon the general fund of Yuba county, amounting to several thousand dollars, which have been regularly presented for payment and registered, and payment refused for want of funds. That the funds now in the treasury, collected of taxes levied for general purposes in the year 1856, are sufficient in amount to pay the bill of the relator, but not sufficient to pay the same if the outstanding warrants aforesaid are entitled to priority of payment. And the question before the District Judge in the case was, whether the said outstanding warrants are entitled to priority of payment out of said funds over the bill of the relator.

The first objection urged before the District Judge, that this was not a proper case for a writ of *mandamus*, on the ground that the relator has an adequate and sufficient remedy by an action at law against the treasurer, and upon his official bond, was not well taken. (See Pr. Act, secs. 466, 467. See notes to case of *Fish v. Weatherwax*, 2 Johns. Cas. 217-51.)

The Act of April, 1856, evidently intended that the relator should be paid for the required services in cash.

1. The third section says: "For services under this Act, the recorder shall receive pay out of the county treasury at the rate of twenty cents per folio of one hundred words: and he shall be *allowed no further compensation whatever for [100] services under this Act."

"Pay" out of the treasury, means money out of the treasury. In statutes, payment refers to money, for nothing but money can "pay."

2. The Legislature undoubtedly intended, from the limited compensation allowed, that such compensation should be in cash. Copyists receive twenty and twenty-five cents a folio, the amount allowed by this Act, and this amount is just one half the amount allowed the recorder by the general fee bill for recording or copying papers.

The supervisors of Yuba county took this view also, for they allowed the bill rendered as a cash bill.

Under the Constitution, the Legislature can make such appro-

priation of the future revenues of the county as in its discretion may seem proper. (*McDonald v. Griswold*, 4 Cal. 352.)

By the Act concerning the records of Yuba County, passed April 19, 1856, the relator was required to transcribe certain records, and for his services the Act provides that he "shall receive pay out of the county treasury."

I think it is clear that the Legislature has appropriated, or directed the county treasurer to apply, which is the same thing, so much of the money collected from taxes of the county for the year 1856, and placed in the treasury, as may be necessary for the payment of the services of the relator. which are exacted by its legislation.

MURRAY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

This appeal is prosecuted from an order of the Court below, granting a *mandamus* to compel the treasurer of Yuba county to pay an account allowed by the supervisors in favor of the county recorder.

In 1856, the Legislature passed an Act requiring the recorder of Yuba county to transcribe certain records of the county. The third section of the Act provides that the recorder shall receive for his services, "pay out of the treasury, at the rate of twenty cents per folio of one hundred words, and he shall be allowed no further compensation whatever, for services under the Act."

The principal question involved is, whether outstanding warrants, drawn on the treasury in 1854 and 1855 are entitled to preference, or priority of payment, out of the revenues of 1856, over the account of the relator. The counsel for the relator contends, that inasmuch as the compensation allowed by the Act for this special service, is not more than one half of that which is allowed by law

for similar services, the inference naturally arises that the [101] Legislature intended the amount should be paid *in cash, and that the Act amounts to a special appropriation, which takes precedence of all other demands upon the treasury.

It has been repeatedly decided by this Court, that the Legislature may make such disposition of county revenues, as it may deem proper. While we have acknowledged the power, we have at the same time expressed our unwillingness to give such a construction to legislative Acts as would serve to impair the rights of third parties, unless express words were employed which irresistibly warranted the conclusion.

In the present case, there are no words in the Act which tend to raise the presumption that the Legislature designed to postpone the other creditors of the county until the account of the relator was paid. Every appropriation, is, in contemplation of law, to be paid in money, and the only inference to be drawn from the fact, that the Legislature specified as a compensation a sum less than what was usually allowed for such services, is, that they supposed the amount would be a sufficient compensation for the particular service required.

Judgment reversed.

GARWOOD v. SIMPSON.

¹ **NEGOTIABLE INSTRUMENT, WHAT IS.**—A draft or order by A. on B., to pay C., or order, the balance due A. by B., is not a negotiable security, not being for any fixed sum, but if endorsed by B., "balance due, one thousand and two hundred and ninety-three dollars and seventy-five cents," over his signature, it becomes a promise by B. to pay C., or his order, that sum, and is negotiable.

IDEM.—**LIABILITY OF NEGOTIATOR.**—Where, in such a case, B. was garnisheed in a suit against C. the day before he had made the endorsement, but failed to inform C. thereof, and C., for a valuable consideration, sold the order, as endorsed, to D., an innocent purchaser: *Held*, that B., having made the order negotiable, and put the same in circulation, is estopped from setting up against it, any antecedent matter, and is liable to D. for the full amount thereof.

IDEM.—**ENDORSEMENT BY PARTNER.**—And where the order was on a firm, and such an endorsement was made by one of the firm, it operated as a release of the firm, by the holder, and as an acceptance by the partner endorsing.

² **FINDINGS NOT REVIEWABLE, EXCEPT ON MOTION FOR NEW TRIAL.**—The party in whose favor a judgment is rendered on a special verdict, must move for a new trial if he is not satisfied with the verdict, as the latter must otherwise be conclusive upon the facts in the appellate Court.

ACCEPTANCE, WHAT DOES NOT CONSTITUTE.—*Per Murray, C. J., dissenting.*—Such an endorsement does not constitute an acceptance, under the circumstances, but only a memorandum of the amount due the drawer of the order.

APPEAL from the District Court of the Twelfth Judicial District Court, County of San Francisco.

Messrs. Carsen & Vance drew their order upon Messrs. Simpson & Jackson.

"Messrs. Simpson & Jackson, please pay the balance due on *the bark New World's cargo, to Edwin Tomlin- [102] son, or order, and this shall be your receipt.

"CARSEN & VANCE.

"EUREKA, March 5, 1856."

On the 15th day of April, 1856, Tomlinson presented the order to Simpson, one of the firm of S. & J., who made this endorsement upon it:

"SAN FRANCISCO, April 15, 1856.

"Balance due on the cargo named in this order, twelve hundred and ninety-three dollars and seventy-five cents.

"A. M. SIMPSON."

On the same day, Tomlinson assigned the order to the plaintiff, for a valuable consideration. On the 14th day of April, one day before the presentation of the order, the amount due to Tomlinson was garnisheed by Mills & Vantine, in the hands of Simpson & Jackson. There was no evidence to show that Simpson, at the time he made the endorsement, informed Tomlinson of the garnishment, or that plaintiff had any knowledge

1. Cited *Palmer v. Andrews*, McAll, 492.

2. Cited *Allen v. Fennon*, 27 Cal, 69; *Whitmore v. Shriceck*.

of it, at the time he purchased the order. Payment of the sum mentioned in the order was duly demanded by plaintiff, and refused by defendant, and suit was then brought by plaintiff to enforce it. The complaint contains a simple statement of the facts, setting out the order and endorsement in full. Judgment was given for the defendant, and the plaintiff appealed to this Court.

C. Burbank, for Appellants.

Simpson accepted the order. A blank endorsement of the drawee on an order is an absolute acceptance of the order. (9 Mass. 57, *Woodbury Storer v. Crawford, Logan, et als.*)

An acceptance may be in writing or by parol. (3 Kent's Com. 100; 2 Greenl. Ev. 161.)

The drawee's name alone on any part of the bill, is a sufficient acceptance. (Byles on Bill of Ex. 164.)

Simpson having accepted the order, in his own name, cannot now say that it is not his acceptance, although the order was directed to Simpson & Jackson.

When a bill is drawn upon several individuals and accepted by one only, the acceptance is good against the one who accepts. (3 Kent' Com. 85, in note.)

The general rule is, that if a bill be drawn upon or endorsed in the name of A., and the partnership firm is that of A. and B., then, although the contract, in respect of which the bill is given, may in fact be a joint contract, still the firm will [103] not be liable on the bill, because the bill, on the face of it, imports a several contract.

In this case, the names of the other partners cannot be supplied by intendment. (Collyer on Partnership, 376.)

A defendant cannot plead to the merits, and put the plaintiff to the trouble and delay of a trial, and then set up a plea not founded in the merits of the case. (Collyer on Partnership, p. 630.)

When the drawee accepted the bill, and fixed the amount in money, which he undertook and promised to pay to the payee or endorsee, the bill became negotiable paper.

The drawing of the bill, the presenting of it for acceptance, the fixing the amount, one thousand two hundred and ninety-three dollars and seventy-five cents, upon the bill, and the accepting for that amount, and the transfer of the bill by the payee to the endorsee, Garwood, was all done in good faith, and now, when Garwood calls for the money, it is unjust, as well as too late, for Simpson to attempt to avoid the payment.

When Simpson fixed the amount, one thousand two hundred and ninety-three dollars and seventy-five cents, as being the amount drawn for, he promised to pay that amount. The drawee received the acceptance for that amount, and Garwood, the endorsee, having paid the money to Tomlinson, relies upon the acceptance, and has the right to recover that amount.

E. B. Mastick, for Respondents.

The instrument in question is not negotiable; it is not a

draft, or bill of exchange, and a recovery cannot be had on it as such.

"An order drawn for a particular fund, will operate as an assignment of the fund, but it will not be negotiable, and is not a bill of exchange." (*Copperthwaite v. Sheffield*, 1 Sand. 416.)

A note payable on a contingency, or out of a particular fund, is not negotiable. (*Coate v. Buck*, 7 Met. 589; *Cushman v. Haynes*, 20 Pick. 132; *Fiske v. Hill*, 22 Pick. 83; *Atkinson v. Manks*, 1 Cow. 69, 107.)

The paper not being negotiable, the rules governing commercial paper are not applicable, and the writing on the back cannot be construed into a contract different from what it clearly purports; that is to say a mere acknowledgment by Simpson, one member of the firm, that such a balance was due on the cargo, not to Tomlinson, or any other person in particular.

It is clearly not an agreement by Simpson to pay that sum to anybody, but an admission that there was in the hands of Simpson & Jackson such a balance remaining unpaid to Carsen & Vance.

If it could be construed into a contract, on paper not negotiable, and he be made liable, he would only be liable for the fund actually in his hands, and the plaintiff [104] must aver and prove the amount. (*Atkinson v. Manks*, 1 Cow. 691, 707.)

He does not acknowledge that he had anything in his hands. Nor is there any evidence showing that he had. Nor is there anything in the statute declaring that a person may be charged as acceptor, by merely writing his name on paper not negotiable.

The proceeds of the cargo having been transferred to Tomlinson, was subject to the attachment of the intervenors, and they, having attached the same and recovered judgment before the endorsement to the plaintiff, were intitled to such proceeds.

The instrument not being negotiable, the plaintiff took it subject to any liens or claims that attached while in the hands of Tomlinson; and he occupies the same position Tomlinson would if he was the plaintiff prosecuting the action. (*Chamberlain v. Day*, 3 Cow. 353; *Fahnestock v. Schoyer*, 9 Watts, 102; 17 Ves. Jr. 245; *Willis v. Trumbly*, 13 Mass. 204.)

If it was not a bill of exchange on its creation, it could not become so afterwards, so as to predicate an action on it against an acceptor, or to charge him as such. (*Kingston v. Long*, 26 Com. Law, abbreviated, 193; *Banbury v. Lissett*, Stra. 1211; *Chitty, J.*, 310; *Haydock v. Lynch*, Lord Ray. 1563; *Dawks v. Lord De Lorraine*, 2 Wils. 207; *Chitty on Bills*, 11 American edition, 144.)

BURNETT, J., after stating the facts, delivered the opinion of the Court—TERRY, J., concurring.

The first question arising under the state of facts in this case,

is, whether the order was a negotiable instrument at the time it was executed by Carsen & Vance. It is objected that it was not a bill of exchange, because there was no sum certain stated, and it was payable out of a particular fund, and not generally.

It is well settled by all the authorities, that the first and principal requisite of a bill of exchange, is, that it must be for the payment of money only, and for a named sum certain. (*Chitty on Bills*, 132, 133.) And it would seem clear in this case, that although the order was drawn payable to Tomlinson or order, still, before he presented it for acceptance, he could not have transferred it as a negotiable instrument. If it had been a bill of exchange, then, upon presentation and refusal to accept, a protest and notice would have been necessary to fix the liability of the drawers.

It is true that a promissory note, or a bill of exchange, will be good when a blank is left for the sum, and that blank is filled up by the party to whom it is given. But this order is a very different instrument. Here the holder was not authorized, before negotiation, to state the sum for which the bill was drawn.

This was not left discretionary with him, and yet it was [105] not set-off by the order itself. When a bill is executed and delivered by the drawer with a blank left for the sum, or time when payable, these matters are not certain, but the power to make them certain, is given to the holder. In this case, Tomlinson could not assign the order before it was accepted, and the sum ascertained. (4 *Doug.* 9; 26 *Eng. C. L.* 193; 22 *Pick.* 83.) The legal effect of this order was an assignment of the particular fund mentioned to Tomlinson. (5 *Paige*, 632; 6 *Barb.* 182.)

But conceding that the order was not negotiable when drawn, was the conduct of the defendant such as to make a transfer of the instrument by Tomlinson to an innocent purchaser, without notice, binding upon the defendant?

The legal effect of the order being an assignment by Carsen & Vance of the particular fund to Tomlinson, the moment the order was accepted, and a certain sum was endorsed upon the order, that moment the debt became one from Simpson to Tomlinson, and the condition of Carsen & Vance, in respect to Tomlinson, was the same as if Simpson & Jackson had actually paid over the money to Tomlinson. Carsen & Vance had, doubtless, drawn this order in favor of Tomlinson, either as a conditional payment, or loan, and when Tomlinson accepted the endorsement of Simpson, in lieu of the money, he necessarily released Carsen & Vance from any obligation to him. The debt then became a debt for a sum certain, due from Simpson to Tomlinson, or order payable on demand. The legal effects of the endorsement of Simpson upon the order, was to incorporate the terms of the order with the endorsement, and upon the delivery of both to Tomlinson, the instrument became a direct and original undertaking on the part of Simpson to pay to Tomlinson, or order, the sum of money stated.

It must be conceded that had no process of garnishment been served, the assignment to plaintiff would have been good, and he would have been able, under our statute, to maintain a suit in his own name. And if assignable at all, then an innocent holder had the right to take it for what it purported to be. By the endorsement, the amount stated was then admitted to be due to Tomlinson; and having put this paper in circulation, the defendant Simpson is estopped from setting up any antecedent matter. Suppose Simpson had actually paid the money to Tomlinson, and then returned him this order thus endorsed, and Tomlinson had afterwards on the same day, sold it to an innocent purchaser for value, would not Simpson have been liable to the holder? If Simpson intended to secure himself from liability to third parties, he should have stated the fact in the endorsement, that the debt had been garnisheed. But no one looking at the order and endorsement would ever suppose that such a thing had occurred. The endorsement contained nothing to put the purchaser even upon inquiry. Upon the face of the order and endorsement *there was due at the time stated, a cer- [106] tain sum which was admitted to be payable to Tomlinson or order, on demand. Having made this admission, and a third party having acted upon it, the defendant cannot be permitted to say that this sum was not then due to Tomlinson, but was due to his creditors.

The cases, cited by the learned counsel for the respondent, differ in their circumstances from the present case. In the case of *Fiske v. Witt, principal, and Moore, trustee*, 22 Pick. 83, certain negotiable notes had been placed in the hands of Moore for collection, for which Moore gave an accountable receipt, promising to account for the proceeds to Witt or bearer. Moore collected a portion of the notes, when a trustee process was served upon him, and afterwards his receipt was presented by a third party, who claimed to be the bearer. It was held that the receipt was not a negotiable security, because not a promise to pay a sum certain. In this case, the bearer had taken the receipt without any endorsement by the trustee, stating the sum due. (22 Pick. p. 83.)

Another case referred to by the counsel of respondent, is that of *Cushman v. Haynes, principal, and Allen and others, trustees*, 20 Pick. 132. The language of the Chief Justice, in delivering the opinion of the Court, would seem to sustain the view we have taken, though it must be conceded that the circumstances of the case itself were quite different from those of the case now under consideration. Haynes had consigned to the trustees certain goods to be sold on commission, and at the same time drew an order on them, payable to his order in thirty days, for the sum of one thousand dollars, on what might be due, after deducting all advances and expenses, which order was accepted by them. After this acceptance, and before the goods were sold, the trustees were summoned in a process of foreign attachment, and it was held that the accepted order was not a negotiable se-

curity, and that the order and acceptance could not operate as an assignment, not being made to a third person. In this case, the accepted order had not been assigned to a third person, and was for no definite amount, even after acceptance. The acceptance specified no certain sum, and the Chief Justice said: "But we are of opinion that the acceptance, not being for a sum certain, but for an uncertain amount—to wit, the balance of the proceeds of goods not then sold—was not negotiable." "It not being a negotiable security, the trustees would not be liable to an action upon it by an endorsee, and it did not amount to payment or an advance." If the acceptance had been for a sum certain, it is apprehended the decision of the Court would have been different.

For these reasons, it is my opinion that the judgment of the Court below should be reversed, and judgment rendered in that Court for plaintiff.

[107] *MURRAY, C. J.—I am compelled to dissent from the opinion of my brethren in this case, because I think that the certificate made by Simpson of the amount due upon the order sued on, was not intended by him as an acceptance of the order, but merely as a statement of the amount due, on account of Carsen & Vance.

The money had been garnisheed in the hands of Simpson & Jackson, in a suit against Tomlinson, the holder of the order, before it had been presented for payment or acceptance; and the endorsement might be, and doubtless was, made for the purpose of informing Tomlinson of the amount due, without any intention, upon the part of the defendants, to become legally liable therefor. There is nothing in the endorsement which would warrant the Court in presuming that the defendants intended, unconditionally, to accept the order. In fact, when we take into consideration that the money had been previously garnisheed in the hands of the defendants, of which fact Tomlinson was doubtless informed, and that the defendant, Simpson, in making said endorsement upon the order, has carefully abstained from the use of any words which would tend to show an acceptance on his part, we are led to the conclusion that the endorsement was only intended as a memorandum of the amount due upon the account, and not as an acceptance of the order.

The majority of the Court, in deciding this case, have passed upon several intricate questions of commercial law, which I do not think involved, and therefore express no opinion upon the conclusions to which my brethren have arrived.

A rehearing being asked for, BURNETT, J., delivered the opinion of the Court, TERRY, J., concurring.

This case was decided at the last April Term of this Court, when the judgment of the Court below was reversed, and that

Court directed to render judgment for the plaintiff. The defendant now asks this Court to so modify the judgment, as to allow a new trial in the Court below. The facts stated in the petition of defendant, and verified by the affidavit of his counsel, renders it proper we should state the grounds upon which we are compelled to deny the application.

In the opinion delivered the plaintiff was considered as the innocent purchaser of the accepted order for value, and our decision was based upon that ground. The learned counsel for the defendant insists, that we were mistaken in this view, as no evidence was preserved in the record, and the entire case, so far as the facts were concerned, rested upon the special verdict of the jury.

In the answer of defendant, it was alleged, "that at the time of the alleged endorsement and transfer to the said plaintiff, he, the said plaintiff, had full knowledge of the aforesaid judgment, *execution, and levy, and the refusal of this [108] defendant to accept the said order or bill of exchange." All the issues raised by the pleadings were submitted to the jury, and the jury, among other things, found that "Tomlinson afterwards, and on the said 15th day of April, for a valuable consideration, endorsed and delivered said order to plaintiff."

The allegation by defendant, that the plaintiff, at the time of the endorsement, had full knowledge of the circumstances under which the acceptance was made, was an affirmative averment on the part of the defendant, which he was bound to prove. The finding of the jury does not sustain this affirmative allegation, but, on the contrary, substantially negatives such an idea. When the jury found that the plaintiff was a purchaser for value, they found, *prima facie*, that he was an innocent purchaser, and there was nothing in the finding to rebut this presumption. There was no motion made to set aside the verdict of the jury, and for a new trial. The plaintiff moved for judgment upon the verdict; the Court gave judgment against him, and he appealed.

The only question presented for the determination of this Court, was the action of the Court below in rendering judgment against the plaintiff upon the facts, as found by the jury. This Court could not review the facts of the case, as no motion was made for a new trial. (*Dewey v. Bowman*, April T. 1857.) And as the record disclosed no error in the Court below in rejecting proper, or in admitting improper testimony, and as no new trial was demanded by either party, this Court could not order a re-examination of the issues of fact. All this Court could do, under the state of case disclosed by the record, was either to affirm or reverse the decision of the Court below, and order a final judgment upon the verdict of the jury.

The defendant states, in his petition, that on the trial, he offered to prove full knowledge on the part of the plaintiff, at the time of the endorsement of the paper to him, of all the cir-

cumstances under which the acceptance was made; that the evidence was rejected by the Court, and exception duly taken by the defendant, but that no statement of the evidence offered or given by the defendant was prepared, for the reason that judgment was rendered in his favor.

If the verdict was unjust to the defendant in not finding the true state of facts, he should have made his motion for a new trial, alleging the true grounds upon which the motion was made. It is the duty of parties to take their objections at the proper time, and in the proper order. The defendant having made no objection to the verdict, and having rested his case upon the facts as found by the jury, it is now too late to ask for a new trial. He should have made his motion for a new trial in the Court below, and if overruled, should have excepted and made a proper statement of the case. Had he done so, [109] the ap-peal by the plaintiff would have brought up the whole record, and this Court, in reversing the case, could have ordered a new trial. (*Dred Scott v. Sanford*; *United States v. Smith*, 11 Wheat. 172.) But there is nothing in the record to show that the Court rejected proper testimony, or that the verdict of the jury was contrary to the evidence, and this Court cannot look beyond the record. Parties should be careful to see that the record contains all the facts of the case. If they submit to a partial statement of facts, this Court can afford them no relief.

Motion denied.

MURRAY, C. J.—I am compelled to dissent from the foregoing opinion, for the same reasons that I dissented from the original opinion; being fully satisfied that the facts did not warrant the plaintiff's recovery.

VISHER v. WEBSTER.

¹ PROMISSORY NOTE DRAWN IN BLANK.—Where the note is given with the rate of interest in blank, and the holder inserts therein a sum for interest without the knowledge or consent of the maker, it does not become thereby void.

¹ IDEM.—FILLING BLANK.—To fill a blank in a note is not an alteration thereof, within the meaning of the rule.

EVIDENCE—DECLARATIONS OF VENDOR.—The declarations and acts of a vendor before sale, are competent testimony to show a fraudulent intent on his part, in a suit to impeach the sale on the ground of fraud.

APPEAL from the District Court of the Fifth Judicial District, County of San Joaquin.

This was an action against the defendant Webster, as sheriff of San Joaquin county, to recover damages for an alleged unlawful seizure of certain personal property, which the plaintiff claimed by purchase from one Hiram Dennis. The sheriff justi-

fied the taking by setting forth that the property attached belonged to Dennis, and that the sale to plaintiff was fraudulent and void, and that A. N. Fisher & Co., as creditors of Dennis, had placed in his hands attachment process, by virtue of which he had levied upon the property. On the trial of the cause, defendant introduced in evidence a copy of the record in the attachment suit, and a note, as the basis of said suit, which read as follows:

\$708 17.

STOCKTON, January 22, 1855.

One day after date, we, jointly and severally, promise to pay Messrs. A. N. Fisher & Co., or order, the sum of seven hundred and eight 17-100 dollars, for value received, with interest monthly at the rate of five per centum per month, until final payment.

BENJAMIN G. WEIR.
HIRAM DENNIS.

*The evidence showed that the note was delivered by [110] the makers thereof, with the rate of interest in blank, and that while in the possession of the holders, the blank had been filled by the insertion of the word "five." Hiram Dennis having been called as a witness for plaintiff; on his cross-examination, counsel for the defense asked him the following question, to which plaintiff objected, and the Court sustained the objection, under the exception of defendant:

"Did you not, about the latter part of February or March, 1855, state to Robert Weir that you had fixed your property so that your creditors could not get it?"

Defendant then called Robert Weir, and asked him if he had not had a conversation with Hiram Dennis, in which Dennis had stated that he had fixed his property so that his creditors could not get it? The Court refused to permit the witness to answer, and defendant excepted.

The Court, among others, gave the following instructions to the jury, under the exceptions of defendant's counsel:

"If the jury believe, from the evidence, that the note on which said judgment was obtained bore no rate of interest at the time it was signed by Dennis, and delivered to the holders, but that it was afterward filled up with the word 'five,' so as to make it draw interest at five per cent. per month, and that such alteration was made without the knowledge or consent of Dennis, that said alteration vitiated the note, and rendered it incompetent evidence, to show that Fisher & Co. were creditors of Dennis."

Judgment for plaintiff. Defendant appealed.

Baine & Bouldin, for Appellant.

The exclusion of the testimony sought by the defense from Dennis, (on cross-examination,) and Robert Weir, as to the declarations made by Dennis in April, 1855, to the effect that he had fixed his (then) present crop, so that his creditors could not get it, was error.

The Court excluded this, on the ground that it must first bring home to Fisher knowledge of the intent of Dennis.

Now, we say this was not the test, and so the law says. (See 3 Cow. 304-6; 1 Paige, 493-4; 2 Id. 59.)

We say that a certain status of facts makes out the fraud in every case.

Again: The second instruction was granted in the teeth of the decision of this Court, in the case of *Fisher v. Dennis*, 6 Cal. 577.

And it may be that the verdict in this case was based alone on the idea that Fisher & Co. were not creditors of Dennis, which idea this instruction had a strong tendency to give them. It would give them no other.

Hence, for this reason alone there ought to be a new trial.

[111] And this case of *Fisher v. Dennis*, (in this Court,) was a bold innovation, if not a flat overthrow of the whole commercial law. (See *Johnson v. Blasdell*, 1 Sme. & M. 21.)

In addition to the current of authorities cited there, we refer the Court to 7 Cow. 337; 5 Cranch. 151; Story on Pro. Notes, Sec. 10.

D. W. Perley, for Respondent.

The second instruction, only, is seriously disputed by the appellant.

On this instruction I maintain two grounds:

1. That it was entirely immaterial to the case, and had no influence whatever in procuring the verdict.

2. That the instruction is legal and proper, and is supported by the authorities.

If the property in controversy clearly belonged to Visher, he had a right to recover damages, for taking it away, even supposing that Fisher's attachment against Dennis was valid, and it became immaterial whether the alteration of the note vitiated the note or not.

If the Court had refused to give this instruction, the verdict must have been the same, for Dennis had no shadow of title to the property.

Where no injury can result from an erroneous charge of the Court, a judgment will not be reversed for such error. (*Neddy v. The State*, 8 Yerg. 249.)

A judgment will not be reversed for an error in the charge given to the jury by the Court below, if it is manifest that the jury decided the case upon other grounds, and without taking into consideration that part of the charge. (*Fitch v. Peckham*, 16 Vermont, 150.)

A judgment will not be reversed for an error which does no injury to party complaining. (8 Watts and S. 391; 7 Mon. 447; 5 Watts and S. 188; 9 Gill and J. 439; 6 Yerg. 425; 13 Ohio, 131.)

The instruction given in this case, was to the effect that if the

jury believed the note had been altered without the knowledge or consent of Dennis, that it vitiated the note, and the doctrine is sustained by the whole current of authorities. (Chitty on Bills, 181, 182.)

A note drawing no interest, being altered so as to draw interest at five per cent. per month, is certainly altered in a material point, and this vitiates the note.

This is the clear doctrine of the common law, and no statute has altered the case in this respect.

*BURNETT, J., delivered the opinion of the Court—MUR- [112] RAY, C. J., concurring.

This was an action brought to recover damages against the defendant, sheriff of San Joaquin county, for wrongfully seizing the property of plaintiff, under an attachment, at the suit of *Fisher v. Dennis*. The property was claimed by plaintiff, under a sale from Dennis, and the defendant set up fraud in the sale. Upon the trial, it was necessary for the defendant to prove that Fisher & Co were creditors of Dennis; and to do this he introduced a copy of the record in the attachment suit, and the note of Dennis, upon which that suit was founded. In reference to this note, the Court below gave this instruction: "If the jury believed, from the evidence, that the note, on which such judgment was obtained, bore no rate of interest at the time it was signed by Dennis, and delivered to the holders, but that it was afterwards filled up with the word "five," so as to make it draw interest at the rate of five per cent. per month, and that such alteration was made without the knowledge or consent of Dennis, that said alteration vitiated the note, and rendered it incompetent evidence to show that Fisher & Co. were creditors of Dennis."

It was proved that, when the note was executed by Dennis, no rate of interest was specified, but a blank was left, in which the word "five" was afterwards inserted. The defendant excepted to the giving of this instruction, and this is one of the errors assigned.

The materiality of this instruction cannot be doubted, if there was any competent evidence tending to show the alledged sale fraudulent. However fraudulent the sale may have been, the defendant could not attack it, in any way, until he proved that the plaintiffs, in the attachment suit, were creditors of Dennis. And if the note, upon which the attachment suit was predicated, was void, the defense of course, must fail. There was certainly some testimony tending to impeach the sale, and this instruction took the consideration of the question of fraud entirely from the jury. The proof of filling up the blank was conclusive, and the jury, under this instruction, were compelled to find for the plaintiff.

That this instruction was erroneous, there would seem to be but little doubt. It was not an alteration of a note, within the meaning of the rule. To fill a blank in a note, is not an altera-

tion of the note. This question was decided by this Court, in the case of *Fisher v. Dennis*, 6 Cal. 577. See, also, *Sme.* 21; 7 Cow. 337; *Story P. N.*, Sec. 110.

Another error assigned, is the refusal of the Court to permit the defendant to prove the declarations of Dennis, made before the sale. To impeach a sale, upon the ground of fraud, [113] the fraud-*ulent intent of both the seller and the purchaser must be shown. The declarations, as well as the conduct of the seller, before the sale, are competent testimony to show this fraudulent intent on his part. This we have held in the late case of *Landecker v. Houghtaling*, 7 Cal. 391, decided at the last term of this Court.

For the purpose of proving a fraudulent intention, on the part of Dennis, the testimony offered was proper, and should have been admitted.

For these reasons, the judgment of the Court below is reversed, a new trial ordered, and the cause remanded for further proceedings.

BURRITT v. DICKSON ET AL.

PARTNERSHIP, LIABILITY OF.—Where an individual, doing business under the firm name of "D. W. & Co.," incurred obligations for professional services to the plaintiff, an attorney, and pending the litigation of his matters, formed a partnership with two others, under the same firm name, and one of the new members of the firm thus formed, subsequently dismissed the suit in the firm name, and when payment for the services was demanded, did not deny the liability of the firm, but refused payment and disputed the amount charged: *Held*, that the firm was estopped from denying their liability.

IDEM.—Though the plaintiff in such a case knew at the time he commenced suit for the original parties, that he alone composed the firm, yet if he do not appear to know on what terms the new firm was formed, he could only be guided by the acts and statements of the new firm.

IDEM.—**PARTIES DEALING WITH FIRM.**—But where it was shown that the plaintiff's partner had drawn up the partnership articles of defendants: *Held*, that plaintiff was bound to know the terms on which the defendants' firm was formed, and that defendants had a right to presume such knowledge, and are not estopped by the acts above recited from denying their liability.

ESTOPPEL, WHEN MAY BE URGED.—Before a party can urge an estoppel against another, he must be misled by the conduct of the other, as to facts known to the latter.

APPEAL from the Superior Court of the City of San Francisco.

This was a suit to recover compensation for professional services. The defendant Dickson did business under the style of Dickson, De Wolf & Co., and employed the late firm of Burritt & Gorham, as attorneys at law. Dickson was also the administrator of one Murray, deceased, and a portion of the professional services were rendered for him as such. Among other professional services rendered by the firm of Burritt & Gorham, was the bringing of the suit of *Dickson, De Wolf & Co. v. Chauviteau*. The suit was brought by B. & G., in the name of H. N.

Dickson, doing business under the style of Dickson, De Wolf & Co. After this suit had been pending a short time, a partnership was entered into by the defendants, Dickson, Campbell & Lott, under the same style of Dickson De Wolf & Co., and the former business continued by the new firm. Dickson gave Campbell & Lott a power of attorney to attend to his business, and the case of *Dickson, De Wolf & Co. v. Chauviteau*, was dismissed by a written *direction, signed "Dickson, De [114] Wolf & Co." without any notice to the plaintiff's attorneys. The written direction was in the handwriting of the defendant Campbell. Some time after the dismissal of this suit, the plaintiff, as surviving partner, made out the account of the firm of B. & G., and called upon the defendants for payment. The items were separately stated, though the whole account was nominally in the name of H. N. Dickson. But in the letter of plaintiff, he stated that some "one thousand three hundred and fifty dollars of said account is chargeable, I suppose, to Mr. Dickson, individually. You will be able to distinguish those items for which the house is chargeable, from those on which he only is liable." The plaintiff, in addition to the letter which was addressed to the firm, appended a memorandum to the account, in these words: "The foregoing account is, nominally, made out against Horatio N. Dickson. The precise amount, chargeable against Messrs. Dickson, De Wolf & Co., I am not able to state with certainty. I have supposed, however, that all that portion not appertaining to the estate of Murray, was chargeable to the firm. The first nine items, amounting to one thousand three hundred and fifty dollars, I therefore look to Mr. Dickson for. The balance, I suppose chargeable to the house." This letter was dated on the 4th of December, 1854, and not receiving any answer, the plaintiff wrote again on the 11th; and on the 12th, Messrs. Dickson, De Wolf & Co. answered, saying: "We have received your letter of the 4th and 11th instant; the former enclosing an account of the firm of Burritt & Gorham against H. N. Dickson, and the firm of Dickson, De Wolf & Co., for three thousand and twenty-five dollars, and both demanding payment of that sum."

"In reply, we cannot forbear expressing our surprise and regret that you should have presented such a claim. We have carefully examined our books in relation to this matter, and believe, upon a just settlement, the firm of Messrs. B. & G., as well as the individual members of the same, will be found in our debt. We are, therefore, compelled to decline paying anything on your account, as you have rendered it." The plaintiff then brought his suit against the firm, for those items not embraced in the nine items chargeable to Dickson. The case was referred to a referee, who reported a judgment in favor of the plaintiff for seven hundred and nine dollars. A motion was made to set aside the report, and for a new trial, which was overruled by the Court below, and judgment given for plaintiff, from which the defendants appealed to this Court.

Glassell & Leigh, for Appellants.

S. L. Burritt, Respondent, in person.

[115] *BURNETT, J., after stating the facts, delivered the opinion of the Court—TERRY, J., concurring.

The only matter of contest in this Court regards the item for professional services in the case of Dickson, De Wolf & Co. against Chauviteau. And the only ground upon which the liability of the firm, for this item, is contested, is that the charge is the individual debt of Dickson, incurred before the formation of the partnership.

The fact is certain that the plaintiff, at the time this suit was brought, knew that Dickson was the sole member of the house of Dickson De Wolf & Co. But it is not shown that the plaintiff knew anything of the terms upon which the new firm was formed. The fact that defendant, Campbell, had dismissed the suit in writing, signed in the name of the firm, without any addition to the signature showing that it was done by an agent of Dickson, was a circumstance that went to show that the new firm had assumed the liabilities of Dickson. It was not the fact, that the name of Dickson, De Wolf & Co., was signed to the written direction, for this was proper, as that was the style of the suit; but it was the fact that the style of the new firm was used by one of that firm, without stating that he acted as the agent of Dickson.

This circumstance afforded the plaintiff a reasonable ground for supposing that the new firm took upon itself the liabilities of Dickson. He therefore stated to defendants, distinctly, that certain items he considered chargeable to Dickson, and would look to him for them, and that the other items he supposed chargeable to the firm. He demanded payment, and distinctly informed the defendants that if payment was not made, he would bring suit. It will be seen from their answer that they did not contest the correctness of the apportionment of the items made by plaintiff between Dickson and the firm, but contested only the justice of the claims. The plaintiff, by this course, was induced to bring his suit against the firm. If they had intended to deny the liability of the firm, they were bound to apprise the plaintiff of their intention. As they knew he was about to bring suit, and was in doubt as to what party to sue, they were bound, in answer to his note, to state candidly who was liable for this item, if not already paid. The services had been rendered, and some party was certainly liable for whatever sum was still justly due.

When a party pursues a certain line of conduct, by which he has induced others to act, he is estopped from afterwards avoiding the consequences of his conduct. (Greenl. Ev. 195, Sec. 27.) The defendants, knowing that plaintiff was laboring under a mistake as to the proper party to sue for this item, were bound, in justice and fair-dealing, to put him in possession of correct

information. His statement to them was clear and explicit, and they made no objection to the conclusion he had drawn that the firm *was accountable for this item. It would [116] seem, therefore, that they had estopped themselves from contesting it upon that ground. Having expressly based their resistance to the claim upon other grounds, and having omitted this, to which their attention was explicitly called, it is too late, after suit brought, to set up such a defense. It has been waived, and could not be afterwards asserted.

For these reasons, it would seem that the judgment of the Court below is correct, and should be affirmed.

MURRAY, C. J.—I am compelled to dissent from the opinion of my brethren in this case, for the reason that I do not think that the defendants can fairly be considered as having admitted any indebtedness due from them to the plaintiff. The record shows that Gorham, a former partner of Burritt, the plaintiff, had, at various times, borrowed money from the defendants, and I think, that the letter of the defendants in reply to that of the plaintiff, does not admit the correctness of the particular items of the plaintiff's account, but was written under the supposition that Gorham was authorized to receive the amount due the firm, and that any payment made to him might be legally offset against the account which the plaintiff had against either the old or new firm. Under these circumstances, I do not think that the defendants can be fairly said to have admitted the correctness of the plaintiff's account, and they ought not to be charged with the same.

A rehearing having been granted, BURNETT, J., at this term, delivered the opinion of the Court—MURRAY, C. J., concurring.

This case was decided at the last April Term of this Court, and the judgment of the Court below affirmed. In that opinion we say: "But it is not shown that the plaintiff knew anything of the terms upon which the new firm was formed."

In the petition of defendants for a rehearing, our attention has been called to a portion of the record which shows that we were in error in reference to this matter of fact.

In January, 1854, a bill of items was made out by Mr. Gorham, in the name of the firm of B. and G., consisting of some fourteen particulars, and furnished by him to the defendants. In that account, there is a charge of fifty dollars against the firm of Dickson, De Wolf & Co., for drawing articles of copartnership. The whole amount of this account was five hundred and seventy-five dollars, and at the close of the account transmitted by the plaintiff to defendants, in his letter of December 4th, 1854, they are charged with, "amount of bill rendered by A. Gorham against Dickson, De Wolf & Co., five hundred and seventy-five dollars.

Before the trial, the plaintiff furnished to defendants' counsel a *bill of particulars, which, by stipulation, is [117]

made a part of the record. In this bill of particulars there is a copy of the bill of five hundred and seventy-five dollars, furnished by Mr. Gorham, and the whole bill is designated as "the first item" in the report of the referee, which rejects this bill as not established by proof. There being no question made as to this bill, and no allusion made in the briefs of either party on appeal, to the fact that the articles of copartnership of the new firm of Dickson, De Wolf & Co., were drawn up by the firm of Burritt & Gorham, the separate items of this "first item" were not examined by us, and in this way this most material matter was entirely overlooked. These facts, taken in connection with the fact that the articles of copartnership were introduced on the trial before the referee, by the plaintiff, show that he did know the terms upon which the new firm was formed. And from the articles of copartnership, it is at once seen that the new firm did not take upon them the former liabilities of H. W. Dickson.

This knowledge on the part of the plaintiff, as to the terms of the partnership of defendants, entirely changes the aspect of the case. The plaintiff, under such circumstances, had no just right to suppose the new firm liable, and it was very natural on the part of defendants, knowing that the firm of B. & G. had drawn the copartnership articles, and that plaintiff knew the fact from the account furnished by himself on the 4th of December, that they should not give the information already in the possession of plaintiff. Before a party can urge an estoppel against another, he must be misled by the conduct of the party, in a case where he is ignorant of facts known to the party against whom the estoppel is alleged. If he knows the facts himself, or has the means of knowing them within his own control, he has no right to throw the labor of communicating them upon others.

In this case, it is very probable that the copartnership articles were drawn up by Mr. Gorham, and that the plaintiff, in making out the account on the 4th of December, did not examine the items of the bill previously furnished by his deceased partner. But this circumstance could not justify the plaintiff. Notice to his partner was notice to him.

For these reasons, the judgment of the Court below should be reversed, and a new trial granted.

[118] *SWARTZ, ADMINISTRATOR, v. HAZLETT ET AL.

PARENT AND CHILD—DEED OF PARENT, WHEN VOID.—Where a parent executes to his infant son a conveyance of property in consideration of services performed, it must be considered as a voluntary conveyance without legal consideration, as he is not legally bound to pay for his son's services. Such a deed is therefore void against the creditors of the parent, if made when his remaining property is insufficient to pay his debts.

DEED AVOIDED BY FRAUD.—Proof of fraudulent intent on the part of the donor is sufficient to avoid the deed, as against an innocent donee.

FRAUDULENT INTENT—IMPLICATIONS.—In determining the question of fraudulent intent of the donor, he must be considered as knowing the law and the state of his own affairs.

FRAUDULENT DEED VOID.—Where A., by a joint deed grants to his son and H. certain premises, for which H. pays a valuable consideration, and the son pays nothing, and the fact of this want of consideration on the part of the son, is known to H., the fraud in part of the conveyance makes it wholly void, as against the creditors of A. at the date of the deed.

IDEM.—If the co-grantee, with the son, was ignorant of the partial want of consideration, whether the deed would be good as to him—*quære*.

APPEAL from the District Court of the Ninth Judicial District, County of Shasta.

The plaintiff, as the administrator of James Daigh, deceased, brought the suit for the purpose of his setting aside a certain conveyance made by his intestate to the defendants on the 12th of September, 1855, of certain premises, of the value of eight thousand dollars, and as grounds therefore, alleged that James Daigh was, at the time of said conveyance, and at the time of his death, indebted to various persons, in the sum of eighteen thousand one hundred dollars, and that said Daigh, at the time of said conveyance, and so at the time of his death, (without the property described in said conveyance,) was insolvent, and unable to pay his debts, and that, in due course of the administration, he had expended the remainder of his intestate's property, and that there was still due creditors the sum of nine thousand dollars. That at the time of said conveyance, the defendant, Daigh, was the minor son of his intestate, and subject to his guardianship and control, and that said conveyance as to both of the defendants, was made without consideration, and for the purpose of hindering, delaying, and defrauding the creditors of said intestate; that said defendants had enjoyed the use and occupation of the said premises from the date of the conveyance; and prayed that said deed should be declared void, and that he also recover damages for the detention of the property.

Both defendants answered separately—Daigh admitting his minority, but claiming that his father had permitted him to labor for himself, and that in the course thereof, his father had become indebted to him to the amount of two thousand three hundred *dollars, and that, so far as he was con- [119] cerned, that was the consideration for the conveyance.

Defendant Hazlett, set up that he paid James Daigh for an undivided one half of the premises, the sum of two thousand one hundred and sixteen dollars; he also denied that the value of the lot exceeded the sum of four thousand dollars. Both defendants denied any fraud, either on the part of themselves or their common grantor. The Court below found that the consideration for the conveyance was actual indebtedness on the part of James Daigh, to both his son and Hazlett, and that it was a sufficient consideration to sustain the deed, although it

was not commensurate with the value of the property; and dismissed the bill, from which decree the plaintiff appealed.

E. D. Wheeler & E. Garter, for Appellant.

The insolvency of James Daigh having been shown, and the minority of his son John Daigh, the grantee and one of the defendants, having also been established, it follows that the conveyance made by James Daigh to his said son, was fraudulent and void against the then existing creditors. (3 John. Ch. 500, —condensed edition, 206—504; 18 Wend. 391, 394, 399, 401; 2 Ves. Sen. 8 to 11.)

It is not necessary that the grantees should have received the gift with a fraudulent intent.

The motives of a recipient of a gift, do not affect the validity of the same. (18 Wend. 388-9, 397; 1 Eden, 167; Amb. 596.)

The alleged contract by which deceased hired his infant son to come to California with him, is no contract, because it is not shown that the son accepted the terms offered, or came to this State pursuant to the same. (Story on Cont. Sec. 1.)

It is *nudum pactum*. (5 Paige, 586.)

It is void under the Statute of Frauds. (Stat. Frauds, Sec. 12; 5 Wend. 206; 11 East. 142.)

Parents are entitled to the services of their children. (1 Black. Com. 453; 2 Kent, 193-4; 2 Mass. 113; Reeves Dom. Rel. 290-1.)

As long, then, as the child lives with the parent, every presumption is in favor of the existence of the ordinary relation of parent and child. Otherwise, great frauds might easily be perpetrated.

The extent to which the authorities go on the emancipation of children, is, the child is permitted to collect its own wages, etc., earned in the employment of others. (7 Cow. 92; 2 Mass. 116; 2 Wend. 463; 20 John. 285, 456.)

The emancipation of the son, as claimed in his answer, amounts to nothing, for the following reasons:

First, there is no proof of acceptance on the part of the son.

[120] *Second, there is no consideration. (2 Wend. 463.)

Third, it should have been in writing. (Stat. Frauds, Sec. 12; 11 East. 142; 10 East. 88.)

The statements of deceased were inadmissible. (Sup. Ct. Cal. January Term, 1857, p. 208.)

Robinson, Beatty & Botts, for Respondents.

The first question raised by the elaborate brief of the appellant is this: What is the legal relation of parent and child, and what is the basis of the doctrine, that the father is entitled, by law, to the services of his infant child? Much of the error into which, as we conceive, the appellant has fallen, arises from confounding the relation of parent and child with that of master and servant. Now, we apprehend, they stand upon a footing

altogether different. The right of the father can hardly be called the right of property. It is not assignable—it is inseparably connected with the correlative obligation to cherish and maintain—it grows out of the duty to obey, and is, upon the part of the child at least, only a moral, and not a legal, obligation. It is true, that against others, who have had the services of an infant child, the father can recover the value of those services; but even this is, as it were, because of the natural guardianship of the father, and is for the purpose of enabling him to maintain the child. As between parent and child, there is no legal title on the part of the parent to the services of the child. The parent may indent his child as an apprentice; that is, as a means of education and maintenance, he may contract with another to stand, *in loco parentis*; but the contract must be for the benefit of the child, not of the father. He cannot compel the child to live with another as a mere servant; he can neither hire nor sell him. A creditor certainly could not attach the father's interest in his child's services, and yet to this, almost, would the appellant's argument go.

We arrive, then, at this conclusion, that although the parent may claim the fruits of his infant's labor, it is for the benefit of the child, and not for others; that is, it is by way of remuneration for what he has done, and as a means of performing what he has yet to do for the child himself; that these rights and obligations lie wholly within the circle of the affections, into which no stranger can be allowed to intrude. It is true, that in the ordinary course of things, the infant, living with the father, and working with him, the labor of the child is so mixed with that of the parent, that it all accrues to the parent, and may go to his creditor. But if this confusion, by an arrangement between the father and child, is avoided—if the fruit's of the child's labor, by the consent of the father, be set apart for the separate benefit of the child, the creditors of the father can never reach it. To this effect is the leading case of *Jenney v. Alden* (12 Mass). In this *case, the father being solvent at the [121] time, promised the son wages; the father afterwards purchased land, paid for it with his own money, and had the deed made to his own son. Here, there was no stipulated amount of wages; but it was found that the value of the land was commensurate with the services of the son. The father died insolvent, and the creditors attached the land as the property of the father. The Court held that the services of the son, under the circumstances, constituted a good and valuable consideration for the conveyance of the land to him; that the father became indebted to the son, and legitimately paid the debt by procuring this conveyance to him. So much do the Courts favor this emancipation of the child, as it is called, that it will be inferred from the slightest evidence. Thus, in *Burlingame v. Burlingame* (7 Cow. 93), the Court say, that the expression, "the employer would do well by the son," who worked for him, seems to indicate that no claims of the father were in contem-

plation. This emancipation may be inferred from circumstances. (*Conover v. Cooper*, 3 Barb. 115.)

In the case of *Steel v. Steel*, 2 Jones, Pa. 64, the son sued the father's executor for services rendered the father in his lifetime, and during the infancy of the son. The Court say, that the facts of the case furnish abundant proof that the peculiar relations of father and son for that purpose had ceased, and that the parties contracted together on the basis of master and servant.

If we are correct in our first position, that the right of the father to the fruits of the labor of his child, is one that he may surrender to the child himself, and that his assent to this emancipation may be made without writing, then do the words and statements of the father become a part of the *res gestæ*, and are provable as such.

We were seeking to establish the fact, that the father had, in the language of the Court, in *Steel v. Steel*, substituted the relationship of master and servant for that of father and child. It is true, that other circumstances may be adduced, to establish the existence of this relation; but what so conclusive as the statement of the father himself? In the northern States, where this custom of filial emancipation prevails, it is frequently done, by a publication signed by the father, notifying the public that he has released his son from any further obligation to work for him. Could it be pretended that such a fact was not admissible, either against the father, or those claiming under him? And what is such a publication, but a statement of the father concerning the new relation that has been established between himself and his son? Accordingly, we find in the cases heretofore cited, frequent reference to the proofs in relation to what the father said and did touching the emancipation of his son. But even as admissions of the father, we apprehend they are admissible against his creditors, who are claiming under [122] him. Again, even if this evidence were not otherwise admissible, they opened the way for it by proving by their own witness, that old Daigh talked frequently about a settlement with his son John.

The Court finds, as a matter of fact, that Daigh, the father, had manumitted the son, and employed him and his cousin, the other defendant, to work for him, before he was in failing circumstances, and that the property conveyed was no more than a fair and adequate consideration for the services rendered; also, that neither of the defendants were apprised of the insolvency of the deceased at the time of the conveyance.

As to the defendant, Hazlett, there can be no pretense to divest him of his interest in this property. He was the nephew of the deceased, he worked for him, and paid debts of the old man's, amounting to \$3,665, out of the funds of himself and cousin, the other defendant; and some of these were debts upon which these poor boys were security for the old man. The creditors of James Daigh find John old enough to become his fath-

er's surety; and it is not the honest boy who pleads the privileges of his infancy, but the greedy creditor, who seeks to avail himself of the obligation arising from his minority. The record does not disclose the fact, but it is very possible, that some of the creditors who are seeking to set aside this conveyance to young Daigh and Hazlett, are some of those to whom these very boys have paid, out of their earnings, since the old man's death, money, as his sureties. If they deny him the rights of a man, they should, at least, have accorded to him the protection and privileges due to a child.

BURNETT, J., delivered the opinion of the Court—MURRAY, C. J., concurring.

This action was brought by the plaintiff, as administrator of James Daigh, deceased, to set aside a deed executed by the deceased in his lifetime, conveying to his nephew, Charles F. Hazlett, and his son, John Daigh, jointly, certain real estate therein described. The complaint charges that the deed was fraudulent and void as against creditors, and alleges the insufficiency of the assets to pay the debts of the deceased, without this property.

The defendants answer separately, each insisting that the deed was fair and honest, and each setting forth the consideration paid by him as his portion of the price of the land.

The defenses set up by the defendants make it necessary to examine them separately, as they do not rest upon the same grounds.

On the part of John Daigh, it is insisted that while he was an infant, living with his father, the deceased voluntarily emancipated him, and then promised to pay him for his labor; that defendant lived with and labored for his father, for some two years and a half, and that for this labor the father was indebted *to the son to the amount of two thousand three [123] hundred dollars, in consideration of which he made the deed to him of an undivided half of the land. To sustain these alleged facts, the defendant proved the verbal declarations of his father, made at different times before as well as after the execution of the deed, the most material of which is thus stated by one of the witnesses:

"Deceased said that, previous to his coming to California, he promised to give John Daigh two thousand five hundred dollars if he would come to California with him and stay two years."

There was no proof of any consent on the part of the son, of any accounts having been kept, or that John Daigh was ever present when these declarations were made.

In the case of *Murdock v. Murdock* (7 Cal. 511), decided at the April Term, we held that when "a party sustains to another a certain relation, and assumes a certain position inconsistent with the claim set up, the proof should either show an express contract, or conclusive circumstances from which a contract might be justly implied."

The right of a parent to the services of his child is not disputed; and the resulting right to change the residence of the child is equally clear. (5 Paige, 596.) And it is equally well settled that a parent may, for some purposes and under some circumstances, emancipate his child. In the case of *Conovar v. Cooper* (3 Barb. 115), it was held that the intention of the father to emancipate his minor child was a question of fact, and in the absence of direct proof, may be inferred from circumstances. In that case, the father was absent for several years, leaving his infant son to manage for himself, and contributing nothing to his support, and not interfering in any way with his son's engagements; it was, therefore, held that the son could sue and recover, in his own name, for work and labor done while a minor.

The same doctrine is laid down in the case of *Burlingame v. Burlingame* (7 Cow. 92). In the latter case, the infant performed the labor with the consent of his father, and for another person; and upon a promise to pay the infant, it was held that the latter could maintain an action in his own name. So in the case of *Benson v. Remington* (2 Mass. 113), PARSONS, C. J., says: "The law is very well settled, that parents are under obligations to support their children, and that they are entitled to their earnings. It is true, parents may transfer this right, or authorize those who employ their children to pay them their own earnings, and the payment will be a discharge against the parents."

We have been referred by the counsel of the defendants to the cases of *Jenney v. Alden*, 12 Mass. 375; and *Steel v. Steel*, 12 Penn. St. 644.

In the first case the father had given his son his liberty [124] at the *age of fourteen. The son went to sea and earned wages, which were received by his father at different times. The father purchased a tract of land, and took the deed in the name of his son. At the time the deed was made, the father was in good credit, and not involved; and it was shown that the amount of wages received by him was about equal to the sum he paid for the land. Under these circumstances, the Court held the deed good. In the second case, the suit was by the son of the deceased against the executor, to recover for services rendered, goods sold, and money paid, for the use of the deceased, after the plaintiff became of age. The plaintiff was a married man, of full age, living separate and apart from his father, upon a farm of his own, and the labor was performed by himself and children upon his father's farm. The proof of the services was clear, and the Court held he was entitled to recover.

It will be perceived that, in most of these cases, the infant was allowed to work for others, and manage for himself. In such cases a payment to the infant was a payment to the father; and, if no payment was made, the infant could sue in his own name. The doctrine in reference to this class of cases, is well stated by SAVAGE, C. J., in *Clark v. Fitch*, 2 Wend. 463:

“When the daughter left her father’s house, he gave her her time, that is, he allowed her to receive her own earnings, and told her she must provide for herself. The effect of this would be, that if her employer paid her wages during her minority, the father could not compel payment again to him. But suppose the daughter had become sick and infirm, would not the father have been liable for her support? And in that event, surely she would be returned to her former situation of servant to her father; and even without any such necessity, I apprehend the paternal rights of the father over the child were not relinquished by what passed between them. There was no consideration for the relinquishment of his daughter’s services, and, in my opinion, he might at pleasure revoke the license he had given his daughter, and call her home, and employ her in his service till she should arrive at maturity.”

The principle upon which the infant is allowed to collect his wages, is that of agency. The infant can be his father’s agent, and whether he is so or not is a question of fact, like any other question of agency, which may be proven by either direct or circumstantial testimony. And as the infant has the right to collect the wages earned by him, he is allowed to sue in his own name. The mere form of bringing the suit is not material, and does not go to the substantial merits of the matter. In many, if not in most cases, the parent might sue. As either party may sue, the first suit brought would exclude the other. But when the question comes up between the parent and the infant, it presents a very different aspect. It is the duty of the parent to *supply his child with necessaries; and he is [125] liable to others who furnish them, under certain circumstances. Can the parent then divest himself of this duty by giving the child his own time? Suppose the child is taken sick, and the parent has means, is he not bound to take care of him, even after he has given him his time? How, and in what way, and under what system of morals, can a parent absolve himself from that responsibility? And if that responsibility continues, the power over the child must also continue. The responsibility and the power must stand or fall together. The duty of the parent to feed, clothe, and educate the child, must be commensurate with the power to control and govern.

It is difficult to see how such a responsible and delicate relation can be destroyed by the voluntary act of the father without consideration. It is difficult to understand how a parent can cease to be the natural guardian of his infant child under such circumstances. And being the guardian of his child, it is difficult to see how any contract, as between them, could be enforced. It is the duty of the parent to support the child; and for doing this, it is very doubtful whether he could maintain a suit against the child, even upon an express promise, made after becoming of age. And when the father promises his infant child a certain reward for doing that which he was already bound to perform, the agreement has no consideration whereon to rest.

It is one of those understandings that must be left to the parties to settle themselves. It is of too doubtful and delicate a character to be the subject of investigation in a Court of Justice. And while I will not undertake to say that no such a case was ever sustained in a Court of Justice, I have not been able to find one; and the learned counsel for the defendants have not referred to any such.

If such agreements between a parent and his infant child could be enforced in a Court of Justice as a good and valid contract, it would certainly place the father and child in a very awkward position with respect to each other. Even in cases where the child is of age, and remains in the service of the parent as one of the family, Courts have manifested great jealousy of claims for compensation. The case of *Candor's Appeal*, 5 Watts & S. 515, is a very strong one. In that case, the alleged services were all performed after the son was of full age, and yet the Court held he was not entitled to recover, upon the ground that no mutual contract was proven. The remarks of *Rogers, J.*, in delivering the opinion of the Court, are very clear and forcible.

"In *Walker's estate* we took occasion to express the reluctance with which we listen to claims for wages by a son, against the estate of a deceased parent; and subsequent experience has not changed or modified the opinion then entertained. It [126] is *pregnant with danger, as we verily believe, as well to the rights of creditors, as to the other heirs, and cannot, of course, be entitled to countenance from the Court, unless accompanied with clear proof of an agreement, not depending on idle and loose declarations, but on unequivocal acts of the intestate; as, for example, a settlement of an account, or money paid by the father to the son as wages, distinctly thereby manifesting, that the relation which subsisted, was not the ordinary one of parent and child, but master and servant." "Were this the case of creditors, instead of heirs, (and yet the principle is the same,) every one would be struck with the great hazard of allowing such a claim on such flimsy pretexts. The temptation of fraud, particularly where the family are in straits and difficulties, is too great. A Court of Justice does the most signal service to the community, when they remove, as far as human laws can, all temptation to fraud, and is kindred vice, prejudice. We must carefully avoid throwing temptation in the path of integrity and truth."

If these views be correct, the alleged agreement between the deceased and his son, was invalid; and the deceased was not indebted to the defendant, *John Daigh*, when the deed was executed. Even if the defendant had been of age, the proof of the contract would have been at least very dubious.

The deed then stands as a voluntary deed, executed while the deceased was in insolvent circumstances. It is true that the Court below considered that the answers denied every material allegation of the complaint, except the minority of *John Daigh*,

which was admitted. But this would seem to be incorrect. The complaint asserts the fact that, the estate was still indebted to the persons mentioned, and others, in about the sum of nine thousand dollars. This is not denied. The complaint also alleges, that the deceased, at the time the deed was made, was, without the property described in the conveyance, insolvent. To this allegation defendants answer, that if the deceased was insolvent at the date of the deed, they did not then, nor do they now, know the fact. This answer is not sufficient under the forty-sixth section of the Practice Act. As the complaint was verified, there should have been a specific denial to each allegation controverted by the defendants, or a denial thereof according to their information and belief.

The deed then being voluntary so far as John Daigh is concerned, can it stand against creditors?

The question, whether a voluntary settlement is void under all circumstances, as against antecedent creditors, has been much discussed by different Judges, and different conclusions arrived at. In *Reade v. Livingstone*, 3 John. Ch. 481, Chancellor KENT held, that such a settlement was void under all possible circumstances, as against antecedent creditors. The same view *is taken by Justice BRONSON, in the great case [127] of *Van Wyck v. Seward*, 18 Wend. 398. The Supreme Court of South Carolina have substantially held the same doctrine. The remarks of Mr. Justice BRONSON are very just and forcible.

“As against the donee, this question never arises until the creditor has lost all other means of obtaining his demand. And why should he lose his debt when the property, on the credit of which it was contracted, has neither been sold, lost, nor expended by the debtor in the course of his business, but has been given away to his family? Why should the right of the creditor to reach the property in the hands of the donee, depend on the inquiry, whether the debtor parted with too much, or too little of his property? Can there be such a thing as a reasonable family settlement, when it ultimately works injustice to the existing creditors of the grantor? I have never been able to discover the principle upon which a title acquired by mere gift, should, under any circumstances whatever, be deemed superior to the claim of the creditor to be paid his debt.”

The rule laid down by Chancellor KENT, and sustained by Justice BRONSON, and so many others of our wisest and best jurists, is, in my conception, the plain, the honest, the efficient, and the humane rule, and the one that, in its practical results, would ultimately produce the greatest amount of good. Whenever laws are so framed as to afford opportunities, and offer inducements, for the commission of fraud, the standard of private and public morality is injured, for which no pecuniary consideration can ever constitute any adequate justification. But I agree with the remark of Chancellor KENT, 2 Com. 442, note “a,” “that the doctrine in *Reade v. Livingstone*, and of the

English Chancellors, on whom it rested, is, I greatly fear, too stern for present times."

But our statute concerning fraudulent conveyances and contracts, has settled the rule upon this subject. By the provisions of the twenty-third section, the question of fraudulent intent in all cases arising under the Act, shall be deemed a question of fact, and not of law, and the want of a valuable consideration shall not constitute conclusive evidence of fraud. The statute contains two provisions. The fifteenth section makes possession by the vendor, after a sale of personal property, conclusive evidence of fraud as against creditors and subsequent purchasers in good faith. This provision of the statute is only affirmative, that a particular fact shall be conclusive evidence of fraud; but it is not exclusive, and does not say that no other fact shall be so considered by the Courts. But in reference to one class of cases, there is a restrictive provision that "no conveyance shall be adjudged fraudulent as against creditors or purchasers, solely on the ground that it was not founded on a valuable consideration." (Com. L. 202.)

[128] *Under these provisions, the mere fact that the deed to

John Daigh was voluntary, would not, of itself, constitute the conveyance fraudulent as to him. It will be necessary, then, to look to other facts in order to determine this question. And as to the alleged fraudulent intent, it is only necessary to inquire into that of the donor, and not that of the donee. (18 Wend. 397.) See also the twenty-fourth section of our Statute of Frauds, which protects only the innocent purchaser, and not the innocent donee.

In determining the intention of the deceased, existing at the time he made the conveyance, it must be assumed that he knew the law, and the fact that he was indebted to others. (*Taaffe v. Josephson*, 7 Cal. 352.) As it must be assumed that the grantor knew both the law and the facts, the proof of a fraudulent intention is conclusive from the testimony. He knew he owed his son nothing for his labor, and the amount of property conveyed by the grantor, and the amount of debts he at that time owed, showed clearly that he knew his creditors must be injured, if the conveyance should be held valid. And it may be safely assumed, that when a person makes a gift of such a proportion of his property, as, considering the amount of his existing debts, a prudent and just man would not make, this circumstance is conclusive evidence of fraud. If, at the time the gift is made, there is a reasonable ground for the fear that existing creditors will not be paid, and it should afterwards turn out that the other property of the donor is insufficient, the gift should be set aside.

We can only judge of intention from facts and circumstances; and as every man must be held to know the law and the facts regarding his own business, he must be held to a reasonable use of this knowledge. If, therefore, he does that which a prudent and just man would not do under the existing circumstances,

his act should be disregarded. It cannot be supposed that our statute intended to protect the donee against anything, except those unexpected events that prudence and integrity could not foresee.

If these views be correct, they dispose of the case, so far as the defendant John Daigh is concerned. In reference to the case of defendant Hazlett, the proof shows that he was of age, and that he did perform about one year's labor for the deceased. It is, however, shown, that a considerable amount of personal property also went into the hands of the defendants, estimated at about four thousand dollars in round numbers. But, at the same time, it is shown that defendants paid debts of deceased to an equal amount, and this, in pursuance of an understanding with deceased that these creditors should be paid. Most of these payments were made before, but some of them after the death of James Daigh. The conclusion of the District Judge that deceased was indebted to defendant Hazlett at the [129] time the deed was executed, seems to be supported by the testimony.

In the case of *Taaffe v. Josephson*, we held that when a part of the consideration of a contract is illegal, or when an entire judgment is composed of several elements, one of which is fraudulent, the whole is void. This is undoubtedly the just rule, as between single parties, or when all purchasers have participated in the illegal consideration. (See 7 Paige, 277; 4 Kent, 281, note "a;" 16 Wend. 183.) But in a case where the deed is made to two or more purchasers, and the consideration passing from some of them, is illegal, but the consideration paid by the others is good, and there is no knowledge on the part of the innocent co-purchasers of the illegal consideration, it may admit of a very strong doubt whether the instrument would be void *in toto*.

In this case, however, it is not necessary to determine that point. The defendant Hazlett must be held to have known the law; and from the testimony, it is clear that he did know what was the alleged consideration paid by John Daigh to the deceased. In other words, he must have known that John was an infant; that the father owed him nothing in law for his labor, and that, therefore, the deed was made by the father without consideration, with intent to injure the creditors. The facts proved show that Hazlett was a member of the family of the deceased; was familiar with his business, and must have known that he was largely in debt, if not insolvent. Under these circumstances, he participated in the conveyance, and whether he actually intended to do that which he thought wrong or not, he is equally as responsible as if he did, for the law cannot but consider an act done with such knowledge both of the law and of the facts, as done with the intent to hinder and delay creditors. For these reasons, I think the judgment of the Court below should be reversed, and that Court directed to enter a decree for the plaintiff.

[130]

BRYAN v. BERRY.

- ¹ **APPEAL, UNDERTAKING NECESSARY TO PERFECT.**—Appellants must show, in their transcripts, the necessary bond to affect the appeal, or else, by the certificate of the clerk of the Court below, that the undertaking has been filed, and the time of filing the same.
- IDEM.**—**OBJECTIONS, WHEN TO BE TAKEN.**—Parties intending to take advantage of the failure to file the requisite undertaking, must do so before the case is submitted.
- IDEM.**—**STAY OF PROCEEDINGS.**—Notice of a motion to set aside an execution and a levy made thereunder, will not operate as a stay of proceedings.
- IDEM.**—**EFFECT OF TAKING.**—Where a judgment is rendered, and an appeal taken to this Court, the Court below loses control over the judgment, and an order amending the judgment is erroneous.
- IDEM.**—**WHEN WILL LIE.**—An appeal will lie from an order of the Court below, changing the judgment.
- ² **EXECUTION—WHEN CANNOT BE SET ASIDE.**—Where third parties have purchased, at an execution sale, it is too late to move to set aside the execution.

APPEAL from the District Court of the Seventh Judicial District, County of Solano.

This was an action by the plaintiff, Bryan, against D. M. Berry, John H. Berry, and James H. Gordon, on a joint and several promissory note. Judgment was rendered thereon, on the 10th day of January, 1856, against all the defendants, jointly, for thirty-eight hundred dollars and costs. A notice of a motion for a new trial, on behalf of D. M. Berry, was given, on the 26th day of January, A. D. 1856, and sustained by the Court. The case was afterwards tried between the plaintiff and D. M. Berry, at the March Term, 1856, of the Court below, and judgment rendered against the said D. M. Berry for forty-one hundred and seventy-six dollars and sixty-three cents, and costs. An appeal was afterwards taken to the Supreme Court, by D. M. Berry, but no undertaking on appeal, filed to stay execution, was given. At the hearing thereof, in this Court, the judgment was reversed, at the October Term, 1856.

On the 5th July, 1856, execution was issued, as upon a judgment in favor of the plaintiff, and against all the defendants, for forty-one hundred and seventy-six dollars and sixty-three cents, and costs.

On the 7th July, 1856, the sheriff made a levy upon cattle, etc., and on the 15th July, 1856, sold the same.

On the 14th July, 1856, D. M. Berry, the appellant, and the other defendants, gave notice of a motion to set aside the execution issued, and the levy made under it, on the ground that such execution was erroneous, irregular and void. The motion to set aside said execution, etc., was heard on the 29th September, 1856.

*See same case, 6 Cal. 894.

1. Approved, *Franklin v. Reiner*, post 340; *Cunningham v. Hopkins*, ante 33; *Hastings v. Hallett*, 10 Cal. 81; *Wakeman v. Coleman*, 28 Cal. 59; *Franklin v. Goodman*, Cal. Sup. Ct., Oct. T., 1856, not reported.

2. Approved, *San Francisco v. Pizley*, 21 Cal. 59.

On the 30th September, 1856, the District Judge made an order, denying the motion to set aside the execution, and in the same order stated that a cross motion was made, on behalf of plaintiff, "to amend the record of the judgment, and the proceedings upon said record, and also the docket of [131] said judgment," and "ordered that the judgment-record, and proceedings therein, made on the — day of June, 1856, in the above entitled cause, be amended, by making the entry of judgment correspond to the title of the cause, so that such judgment shall stand against Daniel M. Berry, defendant, severally, as impleaded with John H. Berry and James H. Gordon, and that the docket of said judgment be altered, so as to conform thereto, and that such amendment be made *nunc pro tunc*, so that such judgment shall be in all respects a perfect several judgment against said Daniel M. Berry, for the sum therein specified, from the date of which the same was entered, and that the execution issue on said judgment, and all proceedings therein be made to conform to the judgment, as amended by this order."

From the order made as above, the said Daniel M. Berry, appealed to this Court, on the 18th day of November, 1856.

John Currey, for Appellant.

The Court below seemed to proceed upon the hypothesis that the execution was merely erroneous and voidable, and that power existed in such Court to amend it. If the execution was void, there was nothing by which it could be amended. That the execution was void, I think there need be no doubt.

In *Parsons v. Lloyd*, 3 Wils. 345, DEGRAY, C. J., observes: "There is a great difference between erroneous process and irregular (that is to say, void,) process. The first stands valid and good, until it be reversed; the latter is an absolute nullity from the beginning. The party may justify under the first, until it be reversed; but he cannot justify under the latter, because it was his own fault that it was irregular and void first." (See, also, to same point, 1 Cow. 734, 735.)

In *Woodcock v. Bennett*, 1 Cow. 734, 735, the Court says: "There is a marked distinction between judgments reversed for error, and executions set aside for irregularity. In the latter case, the party is never excused, if the irregularity be such as renders the process void. One case is the fault of the party himself; the other is considered the error of the Court. (*Rowe v. Wilton*, 2 Wils. 385.)

There is a very great difference between an irregular process and an erroneous process. The suing out an irregular process is the act of the party himself, for which he shall be answerable; but the awarding erroneous process is the act of the Court. (See Serjeant Glynn's argument and decision, by DEGRAY, C. J., in 3 Wils. 343, etc. See also, *Simonds v. Callin*, 2 Caines 61.)

By the two hundred and ninth section of the Pr. Act, it is provided that "the party in whose favor judgment is given, may,

at any time within five years after the entry thereof, issue
[132] *a writ of execution for its enforcement, as prescribed in this chapter."

The writ of execution, by our statute, is issued as the act of the plaintiff; it is not awarded by the Court, and the plaintiff causes the same to be issued, at his peril. If he fails to refer to the judgment intelligibly, or fails to state the names of the parties, the judgment, and the amount thereof, and the amount actually due thereon, it is not the erroneous act of the Court, but is an irregularity of the party himself, the consequences of which the party in fault must bear. (See Pr. Act, secs. 209, 210.)

The order under review was a denial of the motion to set the execution aside, and at the same time, the Court entertained a cross motion, as it is said, "to amend the record of the judgment and the proceedings upon said record, and also the docket of said judgment," and "ordered" that the judgment-record, and proceedings therein, made on the — day of June, 1856, be amended, etc.

The Court was mistaken in supposing that any proceedings were had concerning the judgment-record in June, 1856. The judgment against the appellant was rendered at the March Term, and was a several judgment against him. There was no judgment or judgment-record to be amended. (See *Morrison v. Dapman*, 3 Cal. 255.)

The execution was not amended. It stands now as it did before said order. The appellant's property has been sold under it, as upon a judgment against three persons jointly, which, in fact, never had existence.

The Court is requested to notice the question here suggested: Was not the judgment of January Term, 1856, against John H. Berry and J. H. Gordon, a merger and extinguishment of the note? If so, is not the judgment rendered in March, 1856, void?

Whitman & Bryan, for Respondent.

This was a strange case, as will be perceived from the record and upon an inspection of appellant's brief.

This cause, upon its first hearing below, was decided in favor of respondent, against three defendants. One moved a new trial upon the ground that he was merely a surety upon the note, and not originally liable.

The new trial was granted, and upon the hearing there was a separate judgment entered against the one who obtained a new trial.

From that judgment he appealed to this Court; and at the October Term, 1856, a decision was rendered by this Court, reversing the judgment below.

A rehearing was granted in this Court, and upon the rehearing, the Court, in an additional opinion, affirmed their former opinion in the cause.

*Pending the appeal to this Court, the appellant, Berry, not having filed a bond for stay of proceedings, as he should have done, to stay execution in the cause, an execution issued, and a part of the money was made upon the same, before judgment of reversal was pronounced in this Court. There was a clerical error discovered in the judgment and execution, there being too many parties named in the same, and, upon motion, the Court, by an order *nunc pro tunc*, amended the same.

Now, the appellant, having succeeded in his former suit, by the judgment of reversal of this Court, and the judgment itself being thereby destroyed, he now goes back and appeals from the order correcting the judgment and execution in the matter of clerical mistake, as to naming too many parties.

That is to say, this Court, upon appeal, has destroyed the judgment, yet the appellant afterwards appeals to this Court, from an order in the case affecting the execution.

This is extraordinary. A mere statement is sufficient to show its absurdity. The judgment has already passed through this Court, and is dead, yet an order affecting the judgment and execution can be reviewed in this Court, after the death and burial of the judgment.

If the judgment and execution in our favor was erroneous, so much the better for them, since the judgment was reversed, and one ordered in their favor. The more defects in process, the more favorable to them. An order amending the judgment and process in any manner, could have no effect where the judgment itself is pronounced erroneous. This is too clear for argument.

If they can appeal from an order affecting the judgment and execution, after reversal of judgment, they can appeal from a summons, *præcipe*, order of continuance, or any other interlocutory order or process after the judgment itself has been passed upon in the appellate Court; which is too ridiculous to allow of reasoning upon it.

The fault has been with the appellant. If he wished the execution stayed, he should have filed a bond, to stay proceedings pending his appeal to the Supreme Court.

Having failed to do this, he cannot go back after succeeding in the Supreme Court, and appeal from an order in the same cause, for the purpose of having process pronounced irregular.

The record also does not show that in this second appeal, in the same cause, any bond was filed for appeal to this Court.

We claim that the appeal should be dismissed, with costs.

MURRAY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

This case was decided at the present term, not upon the merits, but upon the ground that there was no undertaking on ap-^{*}peal. As no appeal is effectual for any purpose [134] without an undertaking, the appellant must show affirma-

tively that the undertaking required was given. In this case, the transcript did not show that such undertaking was filed, but upon an application for a rehearing that fact is shown by the affidavit of the counsel of defendant, Berry, and by the certificate of the clerk, and that the undertaking, after having been filed, was lost. To show that the undertaking is filed, the certificate of the clerk will be *prima facie* sufficient, without inserting a copy, and if the respondent has any objections to make against the sufficiency of the undertaking, he should do so, by motion to dismiss the appeal before the case is submitted, and in support of his motion he may use a certified copy of the undertaking.

As the practice in this respect has not been settled, we think the case of the appellant should not be dismissed, under the circumstances. But hereafter, we shall expect the appellant to show by the certificate of the clerk that the undertaking has been filed in due time, and if not shown to have been filed, then we shall require the respondent to make his objection by motion to dismiss, and not for the first time in his brief.

This case was before this Court upon the merits, and was decided at the last October Term, and the *remittitur* sent down on the 2d of December, 1856. After the appeal was taken, the plaintiff caused an execution to issue against the property of all the defendants, as no sufficient undertaking had been filed by defendant Daniel M. Berry, to stay the execution. The execution was issued on the 5th day of July, 1856, returnable in forty days, and was levied on the property of defendant D. M. B., on the 7th of July, and the property sold on the 15th, and the execution returned on the 4th of August, 1856. On the 14th day of July, one day before the sale, the defendant D. M. B., gave notice to the attorney of the plaintiff that he would, at the next term of the District Court, make a motion to set aside the execution, and the levy made under it. The motion was made on the 30th of September, 1856, and overruled by the Court, and an order made by the Court upon the application of the plaintiff, amending the judgment-record *nunc pro tunc*. From the order overruling the motion to set aside the execution and levy, and from the order permitting the amendment, the defendant, D. M. B., appealed on the 18th November, 1856.

We think the District Court did not err in overruling the motion to set aside the execution and levy. The notice that a motion would be made, did not operate as a stay of proceedings. After giving the notice, the defendant should have procured an order staying the sale under the execution until his motion could have been heard. (*Greenup v. Brown*, Breese, 193; *Beard v. Foreman*, Breese 385; *Robinson v. Chisseldine*, 4 Scam. 333.)

[135] *Without such an order the proceedings must go on, and it was too late to move to set aside the execution after the sale, as a part of the property had been purchased by third persons not parties to the suit. The motion was to set

aside the execution and levy, and the effect of this motion, if sustained, would have been to declare void the sales made of the property, as well as that portion sold to third parties, as that portion sold to the plaintiff in the execution.

In the case of *Day v. Graham*, 1 Gil. 435, this question is very fully considered, the authorities reviewed and the correct doctrine laid down. In that case the Court say:

“Upon these authorities, we are of opinion that when the plaintiff in the execution is the purchaser, and before he conveys to another, the Court will set aside the sale, upon motion. But after he conveys to a third person, and when a third person becomes a purchaser, the Court will not determine in this summary way, questions which may affect the rights of others not before the Court, and without opportunity of explaining away those circumstances which might destroy his title.”

But in reference to the order permitting the amendment, we think there was error. The case was pending in this Court, on appeal, and the District Court had lost all power over the judgment. The right to issue the execution was not suspended by the appeal, but the right to amend the judgment appealed from was taken away.

It is insisted by the plaintiff, that as the judgment against defendant D. M. B. was reversed in this Court, and the judgment thereby destroyed, that the defendant had no right to appeal from the order permitting the amendment. But this objection is more plausible than real. The appeal from the order was taken November 18th, and the case on appeal was not finally disposed of in this Court until the 2d of December. And for the very reason that the judgment as it stood before the amendment, was reversed by the decision of this Court, it was proper that the defendant should appeal from the order changing the judgment pending the appeal. It is unnecessary to decide the question raised in the close of the defendant's brief. The case of *Stearns v. Aguirre*, 6 Cal. 176, goes far to settle the point raised.

For these reasons, that portion of the order made by the Court below permitting plaintiff to amend his judgment against the defendant D. M. Berry, is reversed, and the Court below will enter an order vacating the same. The appellant is entitled to the costs of this appeal.

[136] *CRANDALL ET AL. v. WOODS ET AL.*

WATER RIGHTS, FROM POSSESSION OF LAND.—Possession of public land gives the right to the use of water flowing through it for natural wants, but does not confer the right to divert it, and prevent its running upon the adjoining land of another who has taken the same up subsequently, but before the attempt to change the course of the water.

¹ **LAND RIGHTS, UNDER POSSESSION OF.**—Possession of public land carries with it the privileges and incidents of ownership against every one but the government, subject only to rights antecedently acquired.

IDEM.—PRIORITY OF RIGHTS.—As between two locators of public land, the rule, *qui prior est in tempore, potior est in jure*, must always apply.

WATER RIGHTS, BY PRESCRIPTION.—Rights to the use of water become fixed after five years' adverse enjoyment of the same.

APPEAL from the District Court of the Fourteenth Judicial District, County of Nevada.

This was an action for damages and a perpetual injunction on the part of the Union Water Company against Woods and wife, and Andrew Jamieson, for the diversion of water claimed by plaintiff. The defendants Woods disclaimed, while the defendant Jamieson justified his right to the water. The facts were as follows: In the year 1850, the defendants Woods were in the possession of a tract of government land that contained several springs of running water, which, after running a short distance through their natural outlets, united and formed one stream, which, in the year 1851, ran through a small tract of land adjoining, and was used by the owners thereof for irrigation, and other natural purposes. In June, 1852, Woods sold out his right to the springs to the plaintiffs, and became a member of said Company, who at once constructed a system of water-works whereby the town of Grass Valley has been supplied by water ever since the year 1852. The defendant Jamieson connected himself by various conveyances with the title that the possessors in 1851 had to the ranch adjoining the Woods tract, and claimed and exercised the right in 1856 of using the water of plaintiffs for his natural uses. The case was tried before a jury, whom the defendant Jamieson asked the Court to instruct as follows, which being refused, an exception was duly taken: "If the jury believe, from the evidence, that the defendant, Andrew Jamieson, or those under whom he holds, located the ranch or piece or parcel of ground prior to the claim set up by the plaintiffs to the waters of the spring in question, and that the water of said springs, by its natural flow, found its way into defendant Jamieson's said ranch, then that said Jamieson was entitled to the reasonable use of said water, and to have the same flow through his ranch for agricultural and farming purposes, as against the plaintiffs, subsequently diverting the same for culinary and domestic purposes." The jury returned a verdict in

*Same case, 6 Cal. 449.

1. Approved, *Leigh Co. v. Independent Ditch Co.*, post 323; *Fansickle v. Haynes*, 7 Nev. 267; distinguished, *Thorpe v. Freed*, —1 Mont. 685.

*favor of plaintiff, on whom judgment was rendered. [137]
Defendants appealed.

McConnell & Stuart, for Appellant.

There is but a single point presented by the bill of exceptions in this case, for the consideration of the Court. That point is, whether the location and appropriation of a portion of the public land for such purposes as the locator may deem proper to put it, carries with it a right to the use of such water-courses as naturally flow through it, as against persons subsequently appropriating and using the water of such water-courses.

In the case at bar, the ranch called the "Jamieson," or "Bennett," ranch was "taken up," and enclosed in the month of February, 1851, and the plaintiff first appropriated the waters of the several springs, (of which mention is made in the pleadings and bill of exceptions.) in June A. D. 1852.

As the question of priority of location by the defendants appears clearly from the record, and in fact is not controverted, the whole question may be simplified by stating it in the following form:

Does a person, taking possession of a part of the public domain, acquire thereby a right to the reasonable use of such natural water-courses as have, from time immemorial, flowed through such land?

Of this proposition, we maintain the affirmative.

We say first that the word "land" embraces "*ex vi termini*," all streams of water flowing through or upon it, and that possession of land, however obtained, carries with it a usufructuary interest in the waters of such streams as flow through it, as long as such possession continues.

The word "land" legally imports not only the superficial soil, but everything either above or below the surface. (2 Black. Com. 17, 18; 1 Hilliard's Real Property, 51; Coke on Littleton, 4 a, 3 Kent's Com. 401.)

It includes the beds and banks of all streams or pools of water (*stagna*) contained within it; hence it is said that a *præcipe* in a real action or action of ejectment does not lie for a running stream or even a standing pool of water, *eo nomine*, but, for so much land covered with water (*terra aqua co-operta*.) (Coke on Littleton, 4 a; 2 Black. Com 18; Angell on Water-Courses, secs. 5 to 9, inclusive.)

Again: a water-course is said to consist of "bed, banks and water." (Angell on Water-Courses, sec. 4, *passim*; *Gavitt's Adm'r v. Chambers*, 3 Ohio 495; *Starr v. Child*.)

So much for the hypothesis that mere naked possession of land includes a right to the use of flowing waters; but is there any reason why we may not regard every individual in possession of public land in the light of a grantee of the government, and in *that character permitted to shield him- [138]
self behind the government's title against the acts of all subsequent occupants.

Such has been the opinion of this Court, frequently expressed, in reference to the rights claimed by miners and persons appropriating water for mining objects. (*Irwin v. Phillips*, 5 Cal. 146; *Priest v. Union Water Co.*, 6 Cal. 170; *Eddy v. Simpson*, 3 Cal. 249; *Conger v. Weaver*, 6 Cal. 548.)

Now, nothing is better settled, than that a grant of land from government, to a citizen, carries with it, as an appurtenance, a right to the natural, and (to some extent) the artificial use of all streams flowing through such land, even though they be navigable; though in the latter case the grantee is subject to those public rights vested in the government for the benefit of the community, and which cannot be aliened. (Angell on Water-Courses, secs. 5 to 10, inclusive; 14 Mass. 149; *Middleton v. Pritchard*, 3 Scam. 520; *Brown v. Kennedy*, 5 H. & J. 195; 8 Watts 470; 5 Wend. 423; 13 Id. 355; 1 Id. 255; *People v. Platt*, 17 John. 195; 2 Hill, 620; Angell on Water-Courses, sec. 14; 3 Smede & M. 366; *Gavitt's Adm'r v. Chambers*, 3 Ohio 495.)

A. B. Dibble, for Respondents.

The first question involved in the alleged errors, is this: "Does the mere naked location of land in the mineral domain of the State, carry with it the right to all the waters naturally flowing through it at the time of location?"

To apply the doctrine of riparian rights to the settlement of public lands by individuals, is the object and gist of the last instruction.

It cannot be denied, that under the Common Law, (having its origin under the civil) proprietorship of land carried with it, the water naturally flowing upon the land. The maxim *cujus est solum ejus est usque ad cælum*, is too well accredited to be denied. That a grant of the land conveys all that is upon it, as timber, water, etc.; and under the common law, it has of course been held, that the right to a water-course, is a part of the freehold. "That no action will lie to recover possession of a water-course by that name, either by estimating the capacity of the water, as for so many cubical yards, or by superficial measure for twenty acres of water, etc. The action must be for the land at the bottom, calling it twenty acres of land covered by water. To give execution of that which is so wandering and fugitive as running water, is indeed impracticable. Riparian proprietorship is grounded upon grants, having been executed from time immemorial, in the absence of a grant by prescription of many years, raising the presumption of grant." Nor is it denied, that "all the principles of riparian proprietorship made applicable to agricultural and farming countries, had their origin in the peculiarities of climate and country, and in the necessities and wants of the people. The principles of law, as well riparian as others, have received their form, and exist from the necessities of bodies of men, so as to measure out to them that protection which, under the circumstances by which they were surrounded, seemed to be just and right."

If principles of law are to be determined by any other rule than that of the necessities of the people, then the application of the doctrine, that water must flow in its natural channel, without diminution, alteration, or corruption, must be made as well to the mineral domain of this State, as to the agricultural domain of the State of Ohio. (As asserted by Kent, Vide 3 Com. 537-8.)

"No proprietor has a right to use the water to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. Though he may use the water while it runs over his land as an incident to his land, he cannot unreasonably detain it, or give it another direction; and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of water that would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above, without a grant, or an uninterrupted enjoyment of twenty years, which is evidence of it. This is the clear and general doctrine on the subject, and all the difficulty that arises, consists in the application."

The proposition asserted by the appellants, in the instruction above, is this: that the location of the "Bennett Ranch" vested the right in the locator, or possessor, to have the water flow over it. They do not contend that they ever subjected the water to their control, or appropriated it, but that it was at all times liable to be so subjected and appropriated, because of their location of the land, and that only.

On the trial of the case, the defendants did not contend that they had appropriated, in fact, the waters, until defendant, Jamieson, diverted them, in the fall of 1856, after plaintiffs had possessed and fully controlled them over four years; and under the first instruction of the Court, the jury found that plaintiffs were first to locate the water-right and appropriate the waters.

If the naked location of the ranch does of itself vest a right to the water, then plaintiffs are *ab initio* trespassers, and for four years' diversion of the water, are liable to defendants. If such be the case, the water ceases to be subject to appropriation, and he who finds it running, without value to any one, may not divert it, though by so doing, public and private [140] gain, and advantage, would be never so great.

It is not claimed by respondents, when an individual locates land in the mineral domain, and actually renders the water naturally flowing upon and over it, subject to its direction, or manifests and publishes an intention so to do, followed up by acts and works, as required in other cases of appropriation of water, (provided his be the first location thereof,) that he cannot hold the same against persons, subsequently seeking to divert it. Such position is in accordance with the principle of law laid

down by our Supreme Court, in the case of *Tartar v. The Spring Creek W. and M. Co.*, 5 Cal. 305. "The right to the use of water on the public lands, depends upon the principle of prior occupancy."

And such was the language used by the District Court in this case, and which is here questioned by appellants as error—not only may the locator of land possess himself as other parties may, of the first user of the water flowing on his lands, but he may, (as in hundreds of cases he does,) construct his ditch, and from other ravines and streams bring to his use the waters thereof. His necessities require for him the use of water, and he seeks it where others have not appropriated it. Being, in fact, the first appropriator, is it a question as to his right?

"The rule that a water-course must be allowed to flow in its natural channel;" "that the owner of land on the banks of a water-course, owns to the middle of the stream, and has the right in virtue of his proprietorship, to the use of the water in its pure and natural condition;" "that the diversion of a water-course could only be complained of by riparian owners, (assuming the location of mineral lands to be such,) who were deprived of the use, or those claiming under them," cannot apply to a case where the water-course is on the public mineral lands; that the doctrine seemingly applicable, is this: that water may be diverted from a water-course, or corrupted as it flows therein; that priority of appropriation, or manifested intention to appropriate, followed up with suitable acts, evincing such intention, shall give priority of right to the use of water in all cases; that where a right to the use of water has once vested, it may afterwards be divested by fact, establishing abandonment, or by lapse of time. Respondents further refer to the following cases: *Eddy v. Simpson*, 3 Cal. 249; *Irwin v. Phillips*, 5 Cal. 140; *Hill v. Neuman*, 5 Cal. 445; *Kelly v. Natoma Water Co.*, 6 Cal. 105.

MURRAY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

The only question involved in this case is, whether a party who locates upon and appropriates public lands belonging to the *United States, is entitled to the use of streams and water-courses naturally flowing through such lands, as against persons subsequently appropriating and using the waters of said streams. By the common law, the proprietor of lands upon the banks of a water-course owns to the middle of the stream, and the proprietor of the lands through which the stream flows is held to be the owner of the bed of the stream, and entitled to the use of the water which flows over his land.

The property in the water, by reason of riparian ownership, is in the nature of a usufruct, and consists in general not so much in the fluid as in the advantage of its impetus. This, however, must depend in a great measure upon the natural as well as the artificial wants of each particular country. The rule is well settled that water flows in its natural channels, and should

be permitted thus to flow, so that all through whose lands it passes may enjoy the privilege of using it. A riparian proprietor, while he has the undoubted right to use the water flowing over his land, must so use it as to do the least possible harm to other riparian proprietors.

The uses to which water may be appropriated are: 1st, To supply natural wants, such as to quench thirst, to water cattle, for household and culinary purposes, and, in some countries, for the purposes of irrigation. These must be first supplied, before the water can be applied to the satisfaction of artificial wants, such as mills, manufactories, and the like, which are not indispensable to man's existence. Water is regarded as an incident to the soil, the use of which passes with the ownership thereof. As a general rule, a property in water cannot be acquired by appropriation, but only by grant or prescription.

Having thus stated the fundamental principles upon which this right is founded, it is evident that the only difficulty in this case arises, first, from the fact that the defendant is not the owner in fee of the land, but that the title to it is in the government of the United States; and second, the necessity of laying down some rule consistent with our former decisions, and the policy of the State, which has been to protect mining interests and improvements as far as possible.

In *Irwin v. Phillips*, which is the leading case upon the subject of the appropriation of water, it was admitted that the lands upon which the mining-claims were situated, and through which the water-ditch was located, were government lands, and that the mining-claims were located after the water had been appropriated.

In delivering the opinion of the Court, Mr. Justice HEYDENFELDT remarks: "It is insisted by the appellants that, in this case, the common law doctrine must be invoked, which prescribes that a water-course must be allowed to flow in its natural channel. But upon an examination of the authorities which *support that doctrine, it will be found to rest [142] upon the fact of the individual rights of landed proprietors upon the stream, the principle being, both at the civil and common law, that the owner of lands on the banks of a water-course owns to the middle of the stream, and has the right, in virtue of his proprietorship, to the use of the water in its pure and natural condition. In this case, the lands are the property either of the State or of the United States, and it is not necessary to decide to which they belong for the purposes of this case. It is certain that, at the common law, the diversion of water-courses could only be complained of by riparian owners, who were deprived of the use, or those claiming directly under them. Can the appellants assert their present claim as tenants-at-will? To solve this question it must be kept in mind that their tendency is of their own creation, their tenements of their own selection, and subsequent, in point of time, to the diversion of the stream. They had the right to mine where

they pleased through an extensive region, and they selected the bank of a stream, from which the water had been already turned for the purpose of supplying the mines at another point."

Since this decision, a special property has been recognized in water, not in the sense in which the word property is ordinarily used; but the Courts have held, that a right to water as a usufruct, may be acquired by appropriation, as against a subsequent appropriator, who shows no title to the soil; and that by the appropriation of water, and the construction of a canal, the party acquires an easement or franchise, which he may enjoy and protect. If this is an innovation upon the old rules of law upon this subject, it is such a one as the peculiar circumstances of the country, and the immense importance of our mining interest will justify.

In the case of *Starr v. Child*, 20 Wend. 149, Judge BRONSON, in speaking of the obligation of American Courts to follow the rules of common law, as laid down by the Courts of England, uses the following strong language:

"Although the ebb and flow of the tide furnishes an imperfect standard for determining what rivers are navigable, it nevertheless approximates to the truth, and may answer very well in the island of Great Britain, for which the rule was made. But such a standard is quite wide of the mark when applied to the great fresh-water rivers of this continent, and would never have been thought of here if we had not found the rule ready made to our hands. Now, I think no doctrine better settled, than that such portions of the law of England as are not adapted to our condition, form no part of the law of this State. This exception includes not only such laws as are inconsistent with the spirit of our institutions, but such as are framed with special reference to the physical condition of a country differing [143] widely from our *own. It is contrary to the spirit of the common law itself to apply a rule founded on a particular reason, to a case where that reason utterly fails. *Cesante ratione legis cessat ipsa lex.*"

To proceed, however, with the case before us. If the rule laid down in *Irwin v. Phillips*, 5 Cal. 146, is correct as to the location of mining-claims and water-ditches, for mining purposes, and priority is to determine the rights of the respective parties, it is difficult to see why the rule should not apply to all other cases where land or water had been appropriated. The simple question was, that as between persons appropriating the same land, or land and water both, as the case might be, that the subsequent appropriator takes, subject to the rights of the former.

But an appropriation of land carries with it the water on the land, or a usufruct in the water, for in such cases the party does not appropriate the water, but the land covered with water. If the owners of the mining-claim, in the case of *Irwin v. Phillips*, had first located along the bed of the stream, they would have

been entitled, as riparian proprietors, to the free and uninterrupted use of the water, without any other or direct act of appropriation of the water, as contra-distinguished from the soil. If such is the case, why would not the defendant, who has appropriated land over which a natural stream flowed, be held to have appropriated the water of such stream, as an incident to the soil, as against those who subsequently attempt to divert it from its natural channels for their own purposes.

One who locates upon public lands with a view of appropriating them to his own use, becomes the absolute owner thereof as against every one but the government, and is entitled to all the privileges and incidents which appertain to the soil, subject to the single exception of rights antecedently acquired. He may admit that he is not the owner in fee, but his possession will be sufficient to protect him as against trespassers. If he admits, however, that he is not the owner of the soil, and that the fact is established that he acquired his rights subsequent to those of others, then, as both rest alike for their foundation upon appropriation, the subsequent locator must take subject to the rights of the former, and the rule, *qui prior est in tempore, potior est in jure*, must apply.

Let us examine the effect of such a rule for a moment, and see if the consequences which the respondent predicts, viz.: the destruction of the use and value of ditch property in the mines, will necessarily flow from it. A. has located mining-claims along the bed of a stream, before any water-ditch or flume has been constructed; will any one doubt that he should have the free use of the water, as against subsequent locators of either mining-claims or canals? Or, suppose he had located a farm, and the water passing through his land was necessary for the purposes of irrigation, is not this purpose just as legitimate as using the water for mining? It may or may not be equally *as profitable, but irrigation for agricultural pur- [144] poses is sometimes necessary to supply natural wants, while gold is not a natural, but an artificial want, or a mere stimulant to trade and commerce.

It is understood, that the location of land carries with it all the incidents belonging to the soil. Those who construct water-ditches will do so with reference to the appropriations of the public domain that have been previously made, and the rights that have been already acquired, with a full knowledge of their own rights as against subsequent locators.

In the case before us, the plaintiffs are not the proprietors of a ditch constructed for mining purposes, (although we have endeavored to show that this would make no difference.) They claim that they purchased the privilege of the water from one Woods, and conducted the same by means of pipes, etc., to the town of Grass Valley, for the use of the inhabitants. The water in dispute had its source in natural springs rising upon the ranch or farm of Woods, who located the land in 1850. In 1851, the ranch of the defendant which was contiguous to that

of Woods, was located, and the water flowed by natural channels upon it. Woods sold the privilege of diverting the water to the Union Water Co., in 1852. At the time of this sale the rights of the defendants had accrued. Woods had no power of disposition over the water; he could use it for the purpose of supplying the wants of himself and his stock; and if there was sufficient, might, without interfering with the rights of those below him, have used a portion for the purposes of irrigation; but he had no right to divert it from its natural channel, or prevent it from flowing upon the lands of the defendants. (*Evans v. Merriweather*, 4 Ill. 492; and *Arnold v. Foot*, 12 Wend. 330.)

It does not appear, from the evidence in this case, that the water would have flowed through the town of Grass Valley, or that it was the only water which could be obtained for the purpose of supplying the town; neither does it appear that the amount used by defendant for irrigation was so large as to materially diminish the quantity, or render the supply inadequate to the wants of the inhabitants of the town.

The plaintiffs declare as a company, and count upon their appropriation, and not upon their rights as riparian proprietors. This relieves the case of the question, whether, granting the defendant had a right to use the water to supply his natural wants, he could use it for the purpose of irrigating his land.

It is urged by the respondent that they have acquired a right to the use of the stream in question by adverse enjoyment or prescription. To acquire a title in this manner, it is necessary that the enjoyment or prescription should have continued for a period corresponding to the time fixed by the Statute of Limitations as a bar to an entry on land. The period fixed [145] by our statute *is five years; the plaintiff's possession has continued but four, so that his right has not yet become complete.

Judgment reversed, and cause remanded.

DEWEY ET AL. v. BOWMAN ET AL.*

- 1 **APPEAL—FINDINGS, WHEN CONCLUSIVE.**—In equity cases, although no motion for a new trial is made, this Court will not hold the findings of fact by the Court below conclusive.
- PROMISSORY NOTE, INTEREST ON.**—Where a promissory note is payable three months after date, with interest at the rate of — per month, the interest runs from the date of the note.
- 2 **PLEDGE AND MORTGAGE, DISTINGUISHED.**—Where a lease is assigned as security for a note, it is a pledge, and not a mortgage. The "pledgee" does not take the legal title by the assignment, or by failure of the

* Pleading, specific denial, when requisite. Cited, *Thompson v. Lee*, post 280.

1 Overruling, same case, decided, April Term, 1857, not reported. Commented on, *Duff v. Fisher*, 15 Cal. 381; and overruled, *Gagliardo v. Hoberlin*, 18 Cal. 896. Cited, *Lyons v. Lyons*, 18 Cal. 449.

2 Cited, *Payne v. Bensley*, post 267; *Smith*, 49 & 56, Q. M. Co., 14 Cal. 246; *Wilson v. Brannan*, 27 Cal. 271; *Gay v. Moss*, 34 Cal. 132; *Hayland v. Badger*, 35 Cal. 414; *Brewster v. Hartley*, 37 Cal. 25; *Bryant v. Carson Riv. L. Co.*, 3 Nev. 316.

"pledgor" to pay the note; but he has the right to collect the rents, and apply them on the note, and is responsible for the surplus.

IDEM.—A pledgee has no right to sell until after demand and notice; and if he sells without demand and notice, to a party having full knowledge of his title, no absolute title passes, and the property remains in the hands of the purchaser, as a pledge.

APPEAL from the Superior Court of the City of San Francisco.

This was a suit in equity to enforce the performance of a trust, created in the following manner: One Schoyer was the owner of a claim of eight thousand four hundred dollars, for rent of the marine hospital in San Francisco, to become due from the State of California. He assigns five thousand four hundred dollars thereof to one Moses; Moses assigns his claim to plaintiffs. Subsequent to the assignment to Moses, Schoyer, in order to secure the payment to defendant, Bowman, of his note for one thousand five hundred dollars, dated August 25, 1854, payable three months after date, with interest at the rate of four per cent. per month, assigns to him the whole of the rent. Bowman makes out a claim for the whole rent, eight thousand four hundred dollars, and presents it to the State authorities for allowance, and states that his lien thereon consisted of the note and interest. Before this claim is audited, he sells Schoyer's note, and transfers the whole of the State claim to defendant, Cohen, for the face of his note, telling Cohen of the circumstances under which he took the security. Cohen gets from the State eight thousand four hundred dollars in Controller's warrants, which are found by the Court to be worth sixty-five cents on the dollar. No notice was given Schoyer by Bowman of his intention to sell the security. A decree was rendered on the 31st of December, 1856, against Cohen, for the value of the warrants, after deducting one thousand nine hundred and thirty dollars for the Bowman note, and ninety-five dollars for the services of Cohen, in procuring the warrants. No motion was made for a new trial, but the defendant took this appeal directly from the final decree of the 31st of December, 1856.

*Thomas, for Appellants.

[146]

The judgment of the Court below, against Jacob S. Cohen, should be reversed, for the following reasons:

Because the finding of the Court was, so far as Cohen was concerned, contrary to the evidence in the case.

This cause was submitted to the Court, sitting as a jury, upon complaint, answers, and exhibits. The allegations in the complaint, as to the value of the claim against the State of California, and the charge of fraud and collusion between Bowman and Cohen, in the sale of the said claim against the State, by the said Bowman to Cohen, were controverted and denied by the answers of Bowman and Cohen, and the Court was bound to find, as to those allegations, for the defendants who answered.

If Cohen is liable for the value of the claim against the State, as found by the Court, over and above the amount of the note, given by Schoyer to Bowman, and the interest thereon, according to its tenor, then the finding of the Court is without evidence to support it, as to the amount of the principal and interest of the note, at the time of the supposed conversion of the claim against the State, by Cohen, which was on the 28th of November, 1855.

The note was for fifteen hundred dollars, bearing interest at the rate of four per cent. per month, and dated August 24, 1854. There was interest due upon the note, when it was paid by the conversion of the State warrants, on the 28th November, 1855, amounting to nine hundred dollars. Add the interest to the principal, and the result will be twenty-four hundred dollars, the amount actually due upon the note, when it was considered, by the Court below, paid and discharged.

The finding of the Court is, that there was due upon the note, when it was paid, something more than nineteen hundred dollars.

The transaction between Schoyer and Bowman, as to the assignment of the lease by Schoyer to Bowman, to secure the payment of the note for fifteen hundred dollars, with interest, was a mortgage, and upon the failure of Schoyer to pay the note at maturity, the title to the lease became absolute in Bowman. (2 Johns. Ch. 100; 5 Johns. 258; 8 Ib. 96; 10 Ib. 471; 12 Ib. 146; 2 Pick. 610; 9 Wend. 80; 12 Ib. 61; 7 Cowle, 290; 7 How. Pr. 251.)

The title to the lease, upon forfeiture, becoming absolute in Bowman, he could retain the property mortgaged, in satisfaction of his debt, or foreclose by the sale of the property, after a reasonable notice to the mortgagor to redeem, without making application to the Court for that purpose. (1 P. Winsom, 261; 1 Brown P. C. 494; 2 Atk. 303; 2 Kent, 747, top page; 2 John. Ch. 100; Powell on Mort. 1041; 1 Ves. Sen. 278; 2 Fonblanque, 261; 2 Pick. 610.)

[147] *There is no authority, which I can find, in support of the position that the sale of personal property, under a mortgage, by the mortgagee, must be at auction; but, to the contrary, all the authorities cited go to establish the reverse of that proposition.

It is, in the case of sales of personal property under mortgage, the same as it is in others; that the purchaser takes a good title, notwithstanding the person authorized to make the sale fails to give the notices required by law. (2 Bibb, 401, 202; 1 Hill S. C. 239; 8 Mass. 326; 17 Id. 240; 1 Blackf. 210; 1 Miss. 749; 3 J. J. Marsh. 505; 11 Ala. 459.)

Upon the forfeiture of the mortgaged property, and the title in the mortgagee becoming absolute, there is no title remaining in the mortgagor, which can even be subjected to sale under execution against him. But the reverse of this is true, as to the mortgagee. All the title is vested in him, which may be levied

upon and sold, and the purchaser vested with a good title. (5 Ala. 740, 770; 8 Miss. 332; 9 Wend. 258.)

Shafter, Park & Shafter, for Respondents.

The complaint was sworn to, and stated the value of the warrants at sixty-five per cent. upon their nominal amount. There is no specific denial in Cohen's answer of this allegation. Cohen, after specifically denying a portion of the complaint, admitted all the material facts, then proceeds, by way of further answer, to "deny, generally and specifically, each and every allegation of the complaint."

This is an inconsistent answer, and must be false upon its face, and is not permitted under the Practice Act. The general denial, in short, is a nullity.

But if such general denial puts in issue the value of the Controller's warrants, the defendant is entirely concluded by the finding, for upon the "proofs" the Court finds the value to be sixty-five per cent., as alleged, and moreover finds that so much money went into the hands of Cohen, as so much had and received to plaintiff's use.

As to the value of the note from Schoyer to Bowman, this Court have only the statement of counsel in the brief, to oppose to the finding of the Court below.

The appellant assumes that the assignment to Bowman, from Schoyer was a mortgage.

By the terms of the assignment D it was as "security." We think the assignment was as a pledge, and that the case cited, 2 Johns. Ch. 100, and *Lansing v. Cartelyou*, 2 Caines' Cas. in Err., demonstrate it.

But whether this is a case of pledge or of mortgage, it is more security; if a pledge, then neither Cohen nor Bowman could sell without notice. (2 Johns. Ch. 100; 2 Story's Equity, secs. 1030, 1036; and no notice in this action is found.

*If this is a mortgage, then, at law, the mortgagee [148] stood exactly where a mortgagee of realty formerly stood. He has the legal title, and could convey it, but every one who takes it with notice, takes it subject to the mortgagor's equity. He can satisfy the debt out of it, and must account for the residue.

The cases cited by appellant, 1 P. Wms. 261; 2 Atk. 303; 2 Johns. Ch. 100; 1 Ves. Sen. 274; these cases all show that a bill to redeem will be sustained under proper circumstances, and some of them show that the sale was made for less than the debt.

In 2 Story's Eq. secs. 1030-1036, this subject is discussed, and chattel mortgages are, to all intents, there regarded as mere securities, the legal title being only in the mortgagee, for the purpose of paying off his debt. The contract stated in note 4, pages 374-5: "If I, the borrower, repay the money, you must re-deliver the goods, but if I fail to repay it, you must use the security I have left to repay yourself."

This "to repay himself," is the extent of the creditor's right.

BURNETT, J., delivered the opinion of the Court—TERRY, J., concurring.

This case was decided at the last April Term of this Court,* and the judgment of the Court below affirmed, upon the ground that no motion was made for a new trial. Upon a petition for a rehearing, we are satisfied that our former decision was erroneous. The case was an equitable proceeding, and no motion for a new trial is necessary in such cases. We were led into this error by a mistake in the brief of the defendant Cohen, in which the action is styled "an action of trover and conversion."

This case was heard in the Court below upon complaint, answer and exhibits, and not upon "allegations, proofs, and arguments," as the plaintiffs' counsel has it. The finding uses the terms "allegations, exhibits, and arguments," and not the word "proofs," as stated in plaintiffs' additional brief.

This being a proceeding in equity, and having been tried upon the complaint, answers and exhibits, the usual presumption in favor of the correctness of the finding cannot apply.

The only substantial error in the finding of the Chancellor, is in reference to the value of the note of Schoyer to Bowman. In the complaint, it is alleged, that "Schoyer being indebted to said defendant Bowman, upon a note, dated August 24th, 1854, for the sum of fifteen hundred dollars, payable three months after date, with interest at four per cent. per month, for the purpose of securing the payment of said note, executed to said Bowman a writing, a copy of which is hereto annexed, marked D." This instrument was an assignment of the lease to Bowman for the purpose stated in the complaint. The statement of the note, as *contained in the complaint, is the same as the description found in the assignment to Bowman.

The first question to be determined, regards the period at which the interest began to run. Was it from the date of the note, or at the time the note became due? The parties had the right to stipulate what the rate of interest should be, and when it should begin to run. They have expressly stipulated as to the rate of interest, but not as to the time of its commencement. We must, therefore, infer the intention of the parties as to the time the interest should commence, from the note as we find it. From the face of the note, the conclusion is clear, that the consideration for which it was given, passed from the payee to the maker at the date of the note. We must presume that this consideration was of the value of fifteen hundred dollars; this sum the maker promises to pay, with interest, at a specified time. The promise is to pay the amount of the note, with interest on the same, at a future day. The interest, therefore, in the con-

* Not reported.

templation of the parties, must accrue before the note falls due, and must run from the date of the note.

If these views be correct, the note of fifteen hundred dollars would draw interest from the date until the 28th day of November, 1855, the time when Cohen received the State warrants. The principle, with the interest included, would exceed the sum of nineteen hundred and thirty dollars, the amount as found by the Court below.

The fact that Cohen knew the terms of the assignment from Schoyer to Bowman, cannot, we think, be doubted. The assignment of the claim for rent made by Bowman to Cohen was upon a copy of the written application of Bowman to the State officers; in which written application it was expressly stated that the assignment to Bowen was made to secure the payment of the note, and that he claimed no more. Besides, this knowledge on the part of Cohen is expressly charged in the complaint, and not denied in the answer. It is true, Cohen states in the close of his answer, after admitting many facts alleged in the complaint, that he "denies, generally and specially, each and every allegation as set forth in the complaint." But this general and sweeping denial—though the answer is sworn to—is insufficient. The complaint being verified, the answer must contain "a specific denial to each allegation of the complaint, controverted by the defendant, or a denial thereof according to his information and belief;" and "every material allegation of the complaint, not specially controverted by the answer, shall for the purposes of the action, be taken as true." (Pr. Act, secs. 46 and 65.)*

The object of this provision of the statute was to avoid the necessity and expense of producing proof to sustain the allegations of the complaint, in cases where the plaintiff would swear * they were true, and the defendant would not [150] deny the truth of the alleged fact under oath. This end could not be effectually accomplished, if defendants were permitted to deny the allegations of the complaint in general terms. The answer should contain a separate and specific denial of each separate allegation of material fact in the complaint, which is intended to be controverted by the answer. In this way, the attention of the defendant is distinctly and separately called to each allegation of fact, and if he commits perjury in his answer, it can be at once seen in reference to what fact it is committed; and without any reference to this, or any other particular cases, we must be permitted to remark, that it is truly painful to witness the reckless ease with which defendants, in too many cases, make these "general and specific" denials, under oath, of "each and every allegation of the complaint," when it is clear that some of the material allegations of the complaint would never have been separately denied. This is shown, in such cases, by the conclusive proof afterwards produced on the trial.

* *Thompson v. Lee*, post 280.

The principal error assigned by the defendant, Cohen, has reference to a question of law, arising in the Court below upon the facts as found. It is insisted by the learned counsel that "the assignment of the lease by Schoyer to Bowman, to secure the payment of the note for fifteen hundred dollars, with interest, was a mortgage, and upon the failure of Schoyer to pay the note at maturity, the title to the lease became absolute in Bowman."

In reference to mortgages and pledges of personal property in general, it was held by this Court in the case of *Hyatt v. Argenti*, 3 Cal. 151, that they might be made upon such terms and conditions as the parties may agree upon, and Courts of Law will be governed by the language of the contract in each particular case.

A mortgage of personal property passes the present legal title in the property itself to the mortgagee, subject to be re-vested in the mortgagor, his heirs, or assigns, upon the performance by him or them of an express condition subsequent. Such is the effect of a mortgage of personal property at law. But in equity, under proper circumstances, the mortgagor may redeem, even after non-performance of the condition. One of the clearest cases of a mortgage of personal property, as distinguished from a pledge, is found in 8 Johnson, 96. A. sold B. three horses for two hundred and ten dollars, and gave him a regular bill of sale, but at the same time B. gave to A. a writing engaging that on the payment of the two hundred and ten dollars, in fourteen days, to return the horses to A. The money was not paid at the time agreed upon, and the title to the property became absolute in B., and a subsequent tender of the money by A., and demand of the property, did not entitle him to maintain trover for it.

[151] *In the case of a mortgage of personal property, the title being in the mortgagee, the risk of loss is also with him. In the case mentioned, had the horses died, or had they been stolen within the fourteen days, the loss would have fallen on B. And as A. did not pay the money within the time limited, the property became absolute in B., and A. was not liable to B. for the two hundred and ten dollars. In cases of mortgages of personal property, if the mortgagee relies upon his legal rights, and insists that the property becomes his absolutely, the mortgagor will be discharged from all further liability upon the mortgage-debt, unless there is something special in the case.

But it is different in the case of a pledge. The pledgee has a lien upon, not the legal title to, the property. It is taken as security, and the legal title remains in the pledgor. (3 Cal. 162.) If any loss occur, it falls upon him. If the debt, to secure the payment of which the pledge is made, be not discharged when due, the pledgee does not obtain an absolute title to the property. He then has a right to sell the pledged property, and pay himself from the proceeds. If they are not sufficient to discharge the debt entire, the pledgor remains liable for the

deficiency, and if they are more than sufficient, the pledgee is responsible for the surplus. (Story's Eq. Jur. sec. 1030 to 1035a.)

The question then arises, was the assignment by Schoyer to Bowman a mortgage or a pledge? And this question may be answered by considering: first, whether the title in the lease at once passed to Bowman; or, second, whether it was merely intended as a collateral security for the note of fifteen hundred dollars. If it was intended as a mortgage, then all the risk of loss, and chance of gain, were thrown upon Bowman. If no rent had ever been collected upon the lease, Schoyer would not then have been liable to Bowman upon his note.

But it would seem clear that this could never have been the intention of the parties. The assignment itself says it was "made for the purpose of securing said Bowman the payment" of the note. And Bowman, in his written application to the State officers, only claimed so much as would be required to pay the note and interest. And, in addition to these facts, Bowman took a promissory note, drawing interest; and, had no rents been realized, Schoyer would still have been liable upon the note. That the assignment of the lease was but collateral, would seem clear, and could not, therefore, have been a mortgage, but only a pledge. After the note became due, Bowman could have sued Schoyer upon it at any time, without regard to the lease. Upon the failure of Schoyer to pay the note, the title of Bowman in the lease did not become absolute, and the liability of Schoyer upon the note continued. And, as his liability upon the note continued, his right to the surplus of the pledged property, after *paying the note and interest, also continued. [152] And this right he could, and did, assign to two of the plaintiffs.

The case of *Garlick v. James*, 12 John. 145, cited by the counsel for defendant Cohen, is a case in point, and sustains the view we have taken. In that case, the note of a third person was deposited by a debtor with his creditor, as collateral security for a debt, and it was held that this was a pledge, and that the ownership remained in the pawnor; and that the authority of the creditor, "with respect to the note, could extend no further than to receiving the money due upon it, without first calling upon the debtor in some way to redeem. The money, when received, would be a substitute for the note, and to be held upon the same terms, and subject to the same rights and duties as the note."

In the case under consideration, the authority of Bowman only extended to the receiving the rents, and he had no right to sell the lease until after demand and notice. (Story's Equity Jurisp. sec. 1033, and note; 3 Cal. 162.) No demand and notice were shown in this case. The assignment by Bowman to Cohen, who took with full knowledge, passed no absolute title in the property pledged. The proceeds of the lease in the hands of Cohen, remained as a pledge, and he was liable to the assignees of

Schoyer, in the same way as Bowman would have been, had he collected the rents due upon the assigned lease. Cohen had a right to retain an amount sufficient to pay the note and interest, and was liable for the surplus.

For these reasons, the judgment of the Court below must be reversed. And that Court will so modify its judgment as to allow defendant Cohen the amount of the note and interest, and enter a decree in favor of plaintiffs, against him, for the remainder. The defendant Cohen will be entitled to the costs of this appeal.

ADAMS v. WOODS AND HASKELL.

¹ **PARTNERSHIP, RIGHTS OF FIRM CREDITORS.**—Creditors of a firm can pursue their remedy at law, after a bill for a dissolution is filed by one of the partners, and before a decree of dissolution; any other rule would permit the partners indefinitely to postpone the payment of their debts.

IDEM.—Creditors can attack the whole proceedings at any time before the distribution of the assets, on the ground that it was instituted to delay, hinder, and defraud creditors.

IDEM.—A bill for a dissolution and the appointment of a receiver, cannot operate as an assignment for the benefit of creditors, so as to prevent a creditor from acquiring a legal priority, because all such assignments, except in insolvency, are void under the statute.

WRIT OF ERROR to the District Court of the Fourth Judicial District.

[153] *Lynch and others filed their bill of intervention in the Court below, claiming that they were judgment-creditors of Adams & Co., and seeking to have the funds in the hands of the receiver applied to the payment of the debts. The bill alleges that the house of Adams & Co., became insolvent on the twenty-third of February, 1855; that on that day I. C. Woods, the resident and managing partner of the firm, filed, or caused to be filed, a bill in equity in the Fourth District Court, in the name of Alvin Adams, an absent partner, against himself and Haskell; that this bill does not allege a dissolution, or insolvency, but mismanagement of the partnership affairs, and seeks for a dissolution, an injunction, an accounting, the appointment of a receiver, and the application of the assets to the copartnership debts, and that in aid of the receiver, an assignment, in fact, was made by all the parties, to Cohen, as receiver.

The intervenors all allege that this suit was collusive and fraudulent, instituted by Woods for the purpose of hindering and delaying the creditors of Adams & Co. They further allege that they commenced their suits about March 9, 1855, by attachment, and recovered final judgment on the thirty-first of May, 1855, before there had been a decree of dissolution in the case of *Adams v. Woods and Haskell*.

1. Cited *Naglee v. Minturn*, post 544; referred to, *Ludlum v. Fourth Dist. Ct.*, 9 Cal. 13; *Adams v. Woods*, Id. 2v; explained, *Naglee v. Lyman*, 14 Cal. 450.

Mastick and McDougall & Sharpe, for Petitioners.

It will not be denied that equity has jurisdiction in matters of account between copartners, but here not merely the matters of account but the administration of the estate is collusively, and, as we allege, fraudulently thrust upon the Court by parties who are not controverting, but confederating, not for purposes of adjudication, but as a temporary expedient to make arrangements for proceeding in bankruptcy—a step requiring more preparation and caution.

The complaint is filed; not alleging insolvency or a fraudulent conversion of partnership assets, or danger of loss. Service is accepted and a receiver appointed, and bond given, the same day or night, without notice or motion by arrangement between all parties and the receiver.

Here a Court of Equity, at the instance of a bankrupt and fraudulent firm, takes jurisdiction of their entire matters of litigation, and possession of their entire property, or so much thereof as they choose to exhibit.

We have prohibited by statute general assignments. Here is an assignment which is supposed to place the assigned property on sacred ground, yet always under the control of the assignors, or at least under the control of the assignor until the decree of dissolution.

It would be a mistake to suppose that the jurisdiction of equity corresponded with the extraordinary statutory jurisdiction in *proceedings in bankruptcy. For that [154] system, laws have been carefully framed, and a course of administration carefully and completely established. A Court of Equity never was an officer for the administration of partnership or bankrupts' estates, and no rules of practice answering such a purpose can be found in the books or the reports. Courts never assume such burdens, except in cases of *bona fide* controversies where there is a specific dispute as to right. No such controversy or dispute can be found in the origin of this cause, or the matters set forth in the complaint.

It is confidently asserted there is no authenticated case, without this should be one, where equity has ever interfered between creditors and the legal assets of a bankrupt firm before decree of dissolution.

A creditor's bill, from which the opposite party draws his analogies, as known to the English, and, if the term is admissible, common law system, is a suit brought by creditors against executors and administrators to settle an estate. (1 Story's Eq. Juris., 547, *et seq.*)

"The general rule upon which money is required to be paid into Court (*i. e.* to receiver) is this, that the party who is entitled to the fund is also entitled to have it secured." (2 Story's Eq. Jur. 841.)

How have these parties shown any right to have their assets secured? Secured against whom? Themselves? No: against their creditors!

It is clear from all the authorities, that equity in a proceeding between partners for a dissolution, acquires no jurisdiction over the assets, either to marshal or distribute them, and no power over the creditors to limit or control their rights at law, until when, upon a decree of dissolution, the Court having destroyed the copartnership, assumes the place of the copartners, and then the Court must administer the copartnership assets, and then the rule is :

Legal assets must be administered according to the course of the law, and the rule of the maxim "*equitas sequitur legem.*" Equitable assets, where no liens have been acquired, and where no marshaling is required, will be distributed according to the maxim that "equality is equity." (See 1 Story's Eq. Jur., 553-4.)

It is further contended, that if it be true that the intervenors had no right to attach, and took nothing by their attachments, that then they have rights in this cause, as judgment-creditors, with a return of executions *nulla bona*. This position must be certainly true, if the suit of *Adams v. Woods* and *Haskell* was fraudulently instituted, and therefore void.

If the receiver was, in fact, a sacred officer, and if the Court will protect the funds through the hands of assignees and receivers against creditors: yet these creditors have ap-
[155] pealed to the Courts and the law and exhausted all remedy. They now ask that they may come in with their established rights, and claim these assets, as having been the most diligent.

They were the first parties showing an absolute legal right to satisfaction out of these funds, and having exhibited this right to the Court, it is the duty of the Court to administer the same.

Saunders & Hepburn, Contra.

On the 28th day of April, 1856, the appellants, Lynch, Savage, *et al.*, filed their intention in this case, the whole object of which is to possess themselves of the funds in the hands of the receiver, and gain thereby a preference over the other creditors of the insolvent partnership.

As a general rule, it is true that the creditors of a partnership have no interest in a partnership suit, until after a decree of dissolution, and that in the mean time one creditor may go ahead against the partners and get an advantage, if he can. The reason of this is, that until a decree of dissolution *non constat* that the partnership is insolvent, or that the Court will meddle with its affairs, either for account of the complaining partner or the creditors, and at such a stage of proceedings, the creditors having no interest in the suit, and not being parties to it, have each of them, the obvious right to sue for his own account. That however, is not the case; for here we have not only the plaintiff Adams, but the defendants Woods and Haskell, on the day of the suit brought, consenting to close their business, to put their assets into the hands of the Court and out of their own

power, for the purpose of closing the partnership concerns, and paying the partnership debts.

(*Williamson v. Wilson*, 1 Holmes Ch.; and *Waring v. Robinson*, 1 Hoff. Ch., 531, 532.)

MURRAY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

The bill is carefully drawn, and the facts constituting fraud are distinctly stated. The Court below permitted the intervention to be filed, but refused to stay proceedings in the case, or afford the parties any affirmative relief, but directed the receiver to proceed and distribute the money in his hands *pro rata* among the creditors; from which orders and rulings the intervenors have appealed.

The case made, involves two propositions:

1. Whether a creditor of the firm could pursue his remedy at law after the bill was filed and the receiver appointed, but before a decree of dissolution.

2. Whether a creditor could attack the whole proceeding on the ground of fraud and collusion between the parties.

It may be premised, *in limine*, that the bill filed by Alvin *Adams, did not warrant the appointment of a [156] receiver. It does not allege insolvency or fraudulent conversion of the partnership assets, or danger of loss of the same, in the hands of the firm. It is true that equity has jurisdiction in matters of account, but it ought not, except in a clear case, to step between a debtor and his creditors; neither should it assume the position of banker and bailee, for those who, by their own showing, are sufficiently competent to manage their own affairs.

It will not be denied that the creditors of a partnership have no interest in a partnership suit or proceeding for account and dissolution, until after the decree of dissolution, and that, in the mean time, they may pursue their remedies at law, and thereby secure a preference or lien upon the partnership assets.

That until a decree of dissolution, it is not certain that the firm is insolvent, or that the Court will administer the assets. Under such circumstances, it would be obviously unjust to deny a creditor who was not a party to a suit, the right to prosecute an action for the recovery of his claim. There is another reason for this rule which is conclusive. These proceedings are under control of the partnership alone; they may be protracted indefinitely, or they may be dismissed at the will of the parties, and a Court of Equity would not allow itself to become an asylum for bankrupt and fraudulent debtors. It is contended, however, that the assignment by all the parties to Cohen, the receiver, was a voluntary surrender of the assets into the hands of the Court, to be administered for the benefit of all the creditors, and that this proceeding was thus turned into a creditor's bill,

This leads us to inquire into the effect of this assignment. Under the statute of this State concerning insolvent debtors,

every species of assignment, except those made in conformity with the act, are declared void. This relates as well to judicial as to other assignments. If such were not the case, then the Legislature would have failed entirely in the object designed by the act; for the temples of justice would be converted into a den of thieves and money-changers, and the judges compelled to become accessories to the grossest frauds. In the case of *Waring v. Robinson*, which is relied on by the counsel of the respondents, the Court say:

"There is another rule of law bearing on this question: an assignment by one partner, of his share in the property, operates as a dissolution of the firm. The partners may have no confidence in the assignee, nor may the assignee choose to be concerned in the trade. Now the bill and appointment of a receiver on the application of Smith, is, in equity, equivalent to an actual assignment of the property so far as he could assign it."

And upon this ground it was held that Smith could not, after such an equitable assignment, confess a judgment, so as to give a creditor a priority against the property of the partner-
[157] ship. *Our statute having prohibited these assignments, it results that the possession of the receiver was only of such a character as the Court could invest him within the case made by the bill. This is not a creditor's bill; for, as we understand the law, a creditor's bill is a suit brought by creditors against executors and administrators to settle an estate. A New York creditor's bill is the creature of statute, and intended to reach equitable assets, after all legal remedies are exhausted.

The only proceeding at all analogous, is where an administrator institutes a suit against all the creditors, for the purpose of having all their claims adjudicated. "These suits," says Judge STORY in his work on Equity Jurisprudence, section 544, "are not encouraged, because they have a tendency to take away the preference which one creditor may gain over another by his legal diligence. Besides, it has been said that these bills may be made use of by executors and administrators to keep creditors out of their money longer than they otherwise would be."

In the following section, it is said, that upon such a bill, "the Court will not interpose, by way of injunction, to prevent creditors proceeding at law, until there has been a decree against the executor or administrator to account in that suit, for otherwise the latter might, without reason, make it a ground of undue delay of the creditors."

In the case before us, the creditors are not parties. It is not an administrator's bill against creditors, nor a creditor's bill seeking equitable offsets. It is a suit between the members of the partnership, and, until a decree of dissolution, the plaintiff is *dominus litis*, and may deal with it as he pleases. The cases of *Waring v. Robinson*, 1 Hoff. Ch. and *Williamson v. Wilson*,

1 Bland Ch., do not sustain the respondent's position. In the first case, the Vice-Chancellor remarks, that in the case of *Pratt v. Robinson*, he had decided that a judgment obtained before decree of dissolution had priority. Again, he remarks: "Prior to the decree, by analogy to a suit for the administration of the assets of a deceased person, no creditor could be restrained from proceeding at law."

The whole case distinctly recognizes the principle contended for by the appellant, and the decision seems to have gone off on the ground that the filing of a bill, and the appointment of the receiver, were an equitable assignment, of which the plaintiff had notice. In the case in Bland, the Chancellor held, that the insolvency of a firm operated a dissolution in itself, and that, upon a bill being filed, stating such insolvency, a receiver would be appointed. It was stated, in the opinion, that at the time the Court had ordered the creditors to come in and present their accounts, no creditors had acquired any priority. But it is not decided that a creditor could not have got an advantage previous to the order for the creditors to come in and have distribution. *Whether insolvency would, of itself, [158] work a dissolution so as to enable a Court immediately to proceed with the equitable distribution of the assets, is a proposition which it is not necessary to decide, as there is no such allegation in the bill. These cases, together with the leading authorities on this subject, have been so fully examined by BURNETT, J., in the case of *Adams v. Hackett*, 7 Cal. 187, that further comment is deemed unnecessary, and his conclusions upon this branch of the case are adopted.

From this, it must necessarily result that the intervenors, having acquired a lien upon the property of Adams & Co., by attachment and judgment, prior to the decree of dissolution, are entitled to the fruits of their judgment, and must be first paid.

It is contended that this question was substantially decided in the case of *Adams v. Woods*, 6 Cal. 113. I do not so understand that decision. The simple question involved in the case was, whether the Court could compel parties who were the custodians of a fund which they had received from the Court, to pay the same over to an officer or receiver of the Court. In that case the parties claimed the fund, on the ground that it had been attached in their hands, and that they might be made ultimately liable therefor; but this Court held, that no liability would attach on their part, and that, having received the money by order of the Court, they could not be allowed to deny its authority over it. It was a proceeding between the Court and its officer, to which the appellants were not parties, and all that was said by this Court, with reference to the power of the Court below to seize the assets for the purposes of equitable distribution, may be regarded as mere *dictum*, as the point was neither involved nor discussed. Even if we were wrong in this, the appellant alleges that the whole proceeding is void, under the provisions of the

twentieth section of the Act concerning fraudulent conveyances, and his bill shows a state of facts which, if true, would vitiate it. For the purpose of this investigation, it makes no difference whether he obtained his judgment before the decree of dissolution; for, if the proceeding was instituted for the purpose of hindering, delaying, or defrauding creditors, it may be attacked, on that ground, any time before a final distribution of the assets.

Judgment reversed, and cause remanded.

[159]

BAGLEY v. EATON, ET AL.

NEW TRIAL, WHEN AWARDED.—Where the verdict of the jury is clearly against the evidence, a new trial will be awarded.

APPEAL from the District Court of the Fourth Judicial District, County of San Francisco.

This is an action brought by the appellant against the respondents, as administrator and administratrix of the estate of G. C. McMickle, deceased, on three promissory notes made and delivered by McMickle, in his lifetime, to Bagley & Sinton, and by them assigned to Bagley.

The notes all date the 23d of March, 1851, and all bear interest at five per cent. per month, from date.

Due presentation of the claims properly verified, to the administrator, is alleged, and their rejection; and suit was brought within three months thereafter.

To this complaint the defendant answered, and interpose five separate defenses:

1. A general denial.
2. The Statute of Limitations, four years.
3. Payment and satisfaction.
4. That on May first, 1850, Bagley & Sinton made an agreement with the deceased for the purchase, by the latter, of the former, of a lot in San Francisco, for fourteen thousand dollars, on which he paid, up to the 22d of March, 1851, eight thousand four hundred and twenty dollars; that on that day the parties settled, and entered into an agreement, in writing, setting forth the notes sued on as the balance of the purchase-money due; but that the liability of McMickle was limited, and that it was provided, if the notes were not paid, that McMickle was not to be holden, but that the lot became forfeited to Bagley & Sinton, and they were to accept it in full discharge of the notes; that the notes were not paid, and Bagley & Sinton did accept the lot, and sold it to other persons, and so discharged the notes.
5. That the notes were without consideration, and void.

On the trial, the plaintiff offered his own affidavit, and that of R. H. Sinton, which were read to the Court, to show a destruction of the notes sued on, for the purpose of laying the founda-

tion for the introduction of secondary evidence to the jury, of the notes.

After the reading of which, the Court permitted the secondary evidence to be read to the jury, which was the following instrument in writing, executed in duplicate, one part of which was produced by the plaintiff, and the other by the defendants, from *the papers of their intestate, and the signatures to which were all admitted by the defendants' counsel to be genuine. It was signed by McMickle, and by Bagley & Sinton, and acknowledged by each before a notary public, and dates 22d of March, 1851. [160]

The beginning is a penal bond, that Bagley & Sinton become bound for twelve thousand dollars to McMickle. The agreement then sets forth that in May, 1850, Bagley & Sinton sold to McMickle, for fourteen thousand dollars, a lot in San Francisco, describing it. That McM. had, at different times, paid up eight thousand four hundred and twenty dollars, leaving a balance due Bagley & Sinton of five thousand five hundred and eighty dollars, which, together with one thousand dollars interest, made an aggregate due Bagley & Sinton of six thousand five hundred and eighty dollars, at that date, (22d of March, 1851,) and that McMickle had made his three promissory notes to Bagley & Sinton of that date, for that amount: First note for two thousand dollars, at thirty days after date; second, for two thousand dollars, sixty days after date; third, for two thousand five hundred and eighty dollars, ninety days after date, all bearing interest at five per cent. per month from date. That if McMickle should pay to Bagley & Sinton, or their assigns, said notes at maturity, then Bagley & Sinton were to execute to him a deed for the lot; but if McMickle should make default, in any one of all said notes, he was to forfeit all right and title in the lot, and Bagley & Sinton were authorized to make such disposition, etc., as they might see fit.

The assignments of the notes and claim by Sinton to Bagley were proven, and also a presentation of the claim, duly verified, to the administrator, Eaton, and his rejection of it, on the 5th day of January, 1855.

Plaintiff introduced R. H. Sinton, who testified that he drew the agreement above described, and the notes therein referred to; that the notes therein described were executed by McMickle to Bagley & Sinton, and delivered to them. They were never paid, or in any manner satisfied, except as to the amount of three thousand dollars; obtained by a sale of the property to Jane Mooney, June 4, 1851; this sale was on account of McMickle, and in part payment of these notes. He was informed and counseled about the sale, before it was consummated, and knew the terms, and agreed to them, and was satisfied. No other payment was ever made on these notes.

About August or September, 1852, McMickle went to the office of B. & S., and requested them to deliver his notes to him, stating that they were negotiable, and might get into the

market, in the hands of others. The notes were handed to him, and he tore them up. He wanted the bond or agreement, also, but Bagley & Sinton refused to give it to him, because it [161] was the *only evidence remaining of the debt, and told him so. It was distinctly understood, at the time, by McMickle, Bagley, and Sinton, that the claim of the latter on the notes was not abandoned, but only that they were destroyed, to prevent their negotiation into the hands of other parties. For this reason, the bond was not given up. Sinton dunned McMickle for the payment of these notes many times afterwards, and he frequently promised to pay when able. S. asked for payment, at least a dozen times after the destruction of the notes; the last time, three or four months before his death, and got the same answer—that he would pay when he got his affairs all right.

He always evinced a willingness to pay when able. S. had great confidence in him. During these times, he represented himself as embarrassed, but never denied the debt. S. knew, from report, of his embarrassment, but not of his own knowledge, and had, before the destruction these notes, been very indulgent to him.

Real estate, being always very vacillating in San Francisco, B. & S. were offered, in 1849 or 1850, by Col. Bryant, for this lot, \$22,500. In 1850, real estate fell. The sale to Mooney was the then market value. In 1853 it was worth from ten to twelve thousand dollars, and would have sold for it; now, it would not bring as much. That Sinton sold and assigned his interest to Bagley, for a nominal sum, ten dollars, 4th April, 1855; then thought they had committed a fatal mistake in letting the notes go out of their hands; that he thought the \$3,000 from Mooney was credited on the notes; at any rate, McMickle got credit for it.

McMickle never had a deed for the lot, but had control of it. Before the execution of the notes, there was a written memorandum between the parties, setting forth the price, terms, etc.

That Sinton did not transfer his interest to Bagley, because he thought the debt was not honestly due, but because he feared the expenses of litigation, lawyer's fees, etc., and thought it of doubtful collection, after McMickle's death.

Plaintiff here closed his case, and defendants' counsel offered and read in evidence a deed of conveyance from Hiram Pearson to McMickle, dated January 15, 1853, for certain water-lots in San Francisco, which deed was acknowledged and recorded in the recorder's office of the county of San Francisco. (Lib. 20, p. 107.)

This property was entirely distinct and different from the property sold by Bagley & Sinton to McMickle.

The defendants next introduced Dr. Parker, who testified that he had been agent for McMickle and knew about the lot described in the deed from Pearson. The property was worth

twenty-five thousand dollars, and in possession of McMickle by *himself or agents, from date of his deed till [162] his death, in September, 1854.

The lots were capped and piled, with two or three small houses, and tenants paying rent of ninety to one hundred and fifty dollars per month. McMickle, a gambler by profession, had not much money in 1852: was reported insolvent during and up to 1852-'3, and after the deed from Pearson; got this deed from Pierson on a compromise. He claimed one half of the Peter Smith interests of Pearson, but it was settled by this deed.

The defendants then introduced the inventory and appraisement of the estate of McMickle, from the files of the Probate Court.

It was admitted that the administrator had duly given notice to creditors to present their claims against said estate, and that the time expired in 1855, and that no other claims had been presented.

The Court charged the jury that the execution of these notes not being disputed, the sole question for their consideration was, whether or not the notes had ever been discharged.

The jury found a verdict for the defendants.

The Court overruled the motion for a new trial which defendants afterwards made, and entered final judgment on the verdict.

This appeal was taken from the judgment, and also from the order of the Court overruling the motion for a new trial.

Hoge & Wilson, for Appellants.

The verdict against the evidence. (Pr. Act, sec. 193; *Payne v. Jacobs*, 1 Cal. 39; *Agintal v. Crowell*, 1 Id. 191; *Hart v. Hosack*, 1 Caines 25; *Jackson v. Sternberg*, 1 Id. 162; *Newton v. Pope*, 1 Cow. 110; *Dolson v. Arnold*, 10 How. Pr. 528.)

Errors of law, occurring at the trial. Admitting improper evidence to the jury; i. e., the deed from Pearson to McMickle. (*Farmers' and Manufacturers' Bank v. Whinfield*, 24 Wend. 419; 19 Wend. 232; 6 Hill. 292; 1 Cal. 92.)

Erroneous instructions to the jury. (1 Cal. 353.)

Ruling of Court at the time of overruling the nonsuit, requiring further testimony to go to the jury. Evidence as to loss and destruction of notes were addressed to the Court, and not for jury. (9 Wheat. 483; 1 Pet. 597; 15 Pick. 368.)

Glassell & Leigh, for Respondents.

The evidence before the jury was conflicting upon the issue of fact before them, and the Court below properly refused to disturb their verdict, by granting a new trial. (See *Johnson v. Pendleton*, 1 Cal. 132; 3 Cal. 55 and 413; 1 Cal. 180; 2 Cal. 423.)

*The evidence on the one side, for the plaintiff, is the [163] testimony of a witness, one of the payees in the notes sued upon, and the late copartner of the plaintiff.

His evidence is substantially that the said notes have not been

paid or discharged, to the best of witness's knowledge and belief.

But witness is but one of two copartners, either of whom may have received payment for the notes, or otherwise discharged them, and his evidence is scarcely *prima facie* proof, in the absence of the notes, that they have not been paid, or otherwise discharged.

On the other side is the evidence of the defendants, consisting of a chain of circumstances, raising a presumption of payment and discharge, little short of a conclusion.

The circumstance, that, shortly after the sale of the lot for which the notes were given as balance of the purchase-money, under an indenture or agreement between the maker of the notes and the payees, (which indenture was of so equivocal a character that the Court below considered that the said election of forfeiture, and sale accordingly, operated a discharge of the said notes,) the maker McMickle, as if acting upon the understanding that the notes were discharged, went to the holders, Messrs. Bagley & Sinton, and requested them to deliver them up to him to be destroyed.

Upon such request, Messrs. Bagley & Sinton, real estate brokers and business men, having no particular relations of blood or friendship for McMickle, acting also, as if upon an understanding that the notes were discharged, delivered them up to the said maker, and saw them destroyed without objection.

This *prima facie* act of discharge, was done in the absence of any competent witness, and without the scratch of a pen to show any other intention between the parties than that the notes were discharged, and thereby cancelled.

After these notes were destroyed, with all evidence of their existing force, the said holders urge no claim upon them for several years, notwithstanding the maker had property and was responsible for his just debts. Nor is the claim ever prosecuted until it comes up against the estate of a dead man, and is then supported alone by the testimony of one of the payees in the notes, who made himself competent to testify in the matter by selling his interest in the notes.

Upon this circumstantial proof that the notes have been discharged, the jury found the fact accordingly. (2 Gr. Ev., secs. 527, 528; 1 Ph. 436, *et seq.*)

If the plaintiff had really made out his case, as he contends, the introduction of additional proof, on his part could not have subtracted from what he already had.

But the ruling of the Court, that other testimony was [164] requisite to sustain plaintiff's suit, was a correct conclusion of law. There was no evidence before the jury to rebut the presumption of payment arising from the non-production of the notes.

The naked facts before the jury were that such notes as those sued on had been in existence, but were now not forthcoming, and therefore presumed to be paid. (2 Greenleaf, sec. 527.)

Notwithstanding that a predicate had been laid before the judge, for the introduction of evidence of the contents of the notes. (See appellant's authorities on this point, particularly 15 Pick., 375.)

The deed of Pearson to McMickle was properly allowed in evidence.

This deed was part of the evidence showing that McMickle was ostensibly responsible for his just debts, during the time that the claim in controversy was allowed to remain unsettled and unprosecuted, and was supported by the evidence of Dr. Parker, that McMickle continued in possession of the land described in the deed from the date of the deed up to his death,

Its relevancy is obvious, as tending to strengthen the presumption arising from the long delay in prosecuting such a claim, and also in rebuttal of plaintiffs testimony that McM. was insolvent during that time. (2 Greenleaf Ev., sec. 528.)

MURRAY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

The Court below erred in overruling the motion for a new trial. The evidence did not warrant the jury in finding for the defendants; and we are bound to believe, from a full examination of the testimony, that the verdict was the result of mistake, prejudice, or corruption.

The Court also erred in admitting in evidence the deed from Pearson to McMickle, as it was entirely irrelevant, and calculated to withdraw the mind of the jury from the true issue involved in the case.

This is the second time this case has been before us, and we trust that it will be correctly disposed of when it is again tried so that the parties will not be put to the trouble and expense of coming again to this Court.

Judgment reversed, and cause remanded.

WELCH v. SULLIVAN.

[165]

EXECUTION, WRIT OF VENDITIONI EXPONAS.—The writ of *venditioni exponas* is a simple order of the Court to sell property already levied on under execution. It confers no power to levy, and a recital in the return that the sheriff had levied and sold by virtue of the writ is an unimportant error, when it appears that the levy had been previously made under execution.

IDEMS.—SHERIFF'S RETURN.—A description in a sheriff's return, of city lots, by numbers, referring to the official city map, is sufficient.

ESTOPPEL, OBJECTIONS TO DEEDS.—The objection that the deeds, through which the plaintiff in ejectment derails title, are not properly acknowledged, cannot be maintained by one who has no privity with the plaintiff's grantors.

*See same case, post 511 and note. Ejectment on prior possession, insufficient defense, cited *Piercy v. Sabin*, 10 Cal. 30; tenure of public lands, comments on, *Hurt v. Burnett*, 15 Cal. 588; validity of Alameda Grants, *White v. Moss*, 27 Cal. 41.

1. Sufficiency of acknowledgment, cited *Henderson v. Grewell*, post 584.

PUEBLO LANDS.—Under the laws of the Indies, whenever a pueblo was formed by a grant to a founder, or the union of ten or more families, or the foundation of a presidio, or the secularization of a mission, each pueblo was entitled in property to certain tracts of land within the limits of the town to be set apart by them called commons, pasture grounds, and municipal lands by virtue of their organization as pueblos.

IDEM.—The republic of Mexico, after the revolution of 1824, fully recognized the rights of the towns in their commons, pastures, and municipal lands.

IDEM.—Whether the Mexican government retained any power to make grants within the limits of a pueblo, or not, the right of a pueblo to have the municipal and common lands assigned, was an acknowledged equity, charged with which the United States government succeeded to the fee.

IDEM.—**CONGRESSIONAL GRANTS.**—The Act of Congress of 1851 operates as a grant to the pueblos of all lands within their limits, vacant and ungranted, on the 7th of July, 1846.

IDEM.—Such a confirmation is higher evidence of title than a patent, because it is a direct grant of the fee, by the sovereign, through the legislative department, while a patent is only a ministerial act.

PUEBLOS, RIGHT TO DISPOSE OF LANDS.—The pueblos, under the laws of Spain and Mexico, had the right to dispose of certain lands within their limits, to defray municipal expenses.

ALCALDE GRANTS, VALIDITY OF.—The municipal law remained unchanged, after the conquest, until 1850, and grants of pueblo lands by American alcaldes, were grants by the pueblo of its own property, which it had a right to transfer.

IDEM.—**EXECUTION, LANDS LIABLE TO.**—Whether the municipal lands of a pueblo could be sold at forced sale, or not, under Mexican law, the Act of 1851 creates a new tenure, and operates a confirmation of the fee in the town or city, and by the adoption of the common law, in 1850, its lands become liable to execution-sale.

SAN FRANCISCO AS A PUEBLO.—The place called Punta Yerba Buena, on which the city of San Francisco now stands, seems never to have been a pueblo separately from the presidio, which was founded in 1776.

IDEM.—**GRANT TO CITY OF VACANT LANDS.**—The Act of Congress of 1851, operates as a grant to the city of San Francisco of all the vacant lands within her limits, and the confirmation of the U. S. Land Commission is final as to the boundaries therein laid down, the appeal therefrom having been dismissed.

GRANT, TITLE.—Persons who now contest a grant by competent authority within the city limits, must rely on a sufficient title, issued by competent authority, prior to July 7, 1846.

ALCALDE, POWER TO MAKE GRANTS.—Under the laws of Mexico, and the decrees of the Departmental Assembly of California, the ayuntamiento and the alcaldes had power to grant limited portions of the municipal lands of the pueblo. The American alcaldes, appointed after the conquest, had the same authority, as the municipal law remained unchanged until 1850.

EXECUTION, SALE OF PUEBLO LANDS.—Whether under the Mexican law the municipal lands of the pueblo could be sold at forced sale or not, the Act of Congress of 1851, vested the city with the fee of the land, and by the common law, adopted 1850, it became liable to execution-sale.

IDEM.—A sale of the municipal land of the city in January and February, 1852, on an execution issued under a judgment against the city, rendered September 18, 1851, conveyed a legal title to the land, upon which ejectment can be maintained.

EJECTMENT, OUTSTANDING TITLE AS A DEFENSE.—An outstanding title in a third person will defeat plaintiff's recovery in ejectment, although the defendant does not connect himself with it.

IDEM.—**SET-OFF.**—The value of improvements on land may be set-off against the rents and profits thereof.

EXECUTION, SHERIFF'S SALE.—*Per Burnett, J.*—The Act of Congress of 1851, vested the title of the ungranted lands within the city limits, in the city

of San Francisco, and a sheriff's sale in 1852, under "a judgment [166] against the city, entered in September, 1851, passed the title of the city in the purchaser.

STARE DECISIS.—*Per Terry, J.*—Considerations of public policy and justice, as well as regard for individual rights acquired under the law, as announced by the highest judicial tribunal, imperatively demand a strict adherence to the doctrines of the case of *Cohas v. Raisin*.

APPEAL from the District Court of the Fourth Judicial District, County of San Francisco.

Mary Welch brought this action of ejectment to recover possession of the undivided one half of lots 140 and 141, in the city of San Francisco, and for three thousand dollars damages, alleging that she was the owner of the undivided one half thereof in common, and not jointly. The answer of the defendants consisted of—

1. A general denial.
2. Statute of Limitations.
3. The Settlers' Act of 1856.
4. Outstanding title in Limantour.
5. Title in defendant Sullivan under the Sherreback grant.
6. Valuable improvements erected by the defendants on the premises, of the value of twenty thousand dollars.

On the trial, the plaintiff introduced in evidence the record of the judgment of the case of *Peter Smith v. The City of San Francisco*, an execution running therefrom, with the sheriff's return thereon, stating that he had levied upon, as the property of the city of San Francisco, among others, the lots in controversy, describing them by figures, and by reference to the official map of the city. The sale under this execution having been stayed by injunction, plaintiff introduced as evidence a writ of *renditioni exponas*, the return of which recited that on the 14th of June, 1851, the sheriff of San Francisco sold the premises to Peter Smith, by virtue thereof; next, a deed from the sheriff to Peter Smith, and then a series of deeds connecting plaintiff with the title of Peter Smith. It further appeared from the stipulation of counsel at the trial, that there was a pueblo, and that the lands in question are within the limits of the decree of confirmation to the city, which limits embraced the pueblo, and the pueblo limits are co-extensive with the confirmation.

There was some evidence going to sustain and disprove the Limantour title. The Court, under the exception of defendants, among others, gave the jury the following instruction:

"If the jury believe, from the evidence, that the lands described in the complaint, are covered by the alleged grant of Limantour, and that said grant is fraudulent and manufactured, and was not in fact made, as it purports to be, by Micheltorena, when he was actually Governor of California, then the plaintiff is entitled to recover."

*The jury, under the instruction of the Court, found a [167] verdict in the following form:

"We find for the plaintiff.

"We find the value of the whole land in question to be ten thousand dollars.

"Value of its use and occupation eighteen hundred dollars.

"Value of the improvements thereon forty-two hundred dollars."

On this verdict, judgment was rendered in favor of plaintiff for the possession of the undivided one half of the premises, and nine hundred dollars damages. Defendants moved for a new trial, which being denied, they appealed.

Nathaniel Bennett for Appellant.

In ejectment, the plaintiff must recover on the strength of his own title. Every substantive fact, required by law to make out his claim, must be proved. No fact will be presumed in his favor. In the deduction of title, every *mesne* conveyance, through which he claims, must, like any other fact, be established by proof. If he claims under an execution-sale, he must not only prove the execution and judgment, but he must also establish ownership of the land in the judgment-debtor, as one of the necessary steps in the deduction of his title. These are elementary propositions.

This is an action of ejectment. The plaintiff claims under an execution-sale. The judgment-debtor is the city of San Francisco. The plaintiff can recover only what the city of San Francisco is proved to have had, and, if the city had nothing, the plaintiff can recover nothing. Again, though the city may have had an interest, yet, if it were of such a nature that it could not be taken under a forced sale—for instance, if the city were a naked trustee, holding the premises in trust for the inhabitants in general, without any beneficial interest in herself, then she had no interest which passed to the plaintiff, upon which ejectment can be maintained. From these considerations, two questions arise:

1. Did the city of San Francisco own the premises? In other words, was the fee of the land vested in the city, or did it still remain in the government?

2. Conceding that the city of San Francisco held the fee, or had some claim, right, or title, legal or equitable, in the premises, was such a claim, right, or title, whatever it may have been, the subject of levy and sale on execution?

I maintain the negative of both the above questions, and I assert, as propositions, which I shall endeavor to make clear:

1. The city of San Francisco was not the owner of the premises—that is to say, the fee of the land was not in the city, but still remained in the government.

[168] *2. Conceding that the city had some estate, right, or interest—it was not subject to sale on execution.

First, then, as to the vested estate in the city—I have said that the burden of proof lay on the plaintiff, to prove the interest of the city, but a very strange anomaly, in *nisi prius* trials, presents itself in the progress of this cause. The rule I have

stated had been adhered to by lawyers and Judges, in this country and in England, from the earliest ages of our juridical history; and it had been supposed to be settled, that, in an action of ejectment, it lay with the plaintiff to establish by proof, that he, and those under whom he claimed, had the title, and that the burden of proof was not, in the first place, cast on the defendant to prove that the plaintiff had no title. And this rule of law was supposed to be so well founded on good sense and justice, that it had been held universally applicable, not only in actions of ejectment, but in all other actions, so that it might be said to have become an axiom in legal science, that the law would not require a party to prove a negative—that it would not call upon the defendant to disprove the alleged title of the plaintiff, until the plaintiff himself had adduced some evidence tending to establish it—that it would not deprive a person of the enjoyment of a right in possession, solely because he might not be able to disprove every unsupported claim which could be alleged against him.

This rule, however, by which justice had been administered for a thousand years, was deemed inapplicable to the condition of affairs in San Francisco, and derogatory to the advancement of legal science in the nineteenth century—while the strange doctrine was sustained by the Court, that, in an action of ejectment, where the plaintiff claimed under an execution-sale, title in the judgment-debtor would be presumed without proof, and that the burden of disproving this unsustained allegation of the plaintiff lay upon the defendant. Is this law?

I notice this here, to show how far the settled rules of evidence have been departed from, in order to help the plaintiff to recover. If the plaintiff had been held to abide by the law, and prove her case like other plaintiffs, there would have been no cause for apprehension on the part of the defendant; but as it would have been highly inconvenient for the plaintiff to be obliged to prove a fact which did not exist, the Court kindly helped her out of the difficulty by presumption.

But, notwithstanding all the aid which the plaintiff may derive from the unheard of presumption above referred to, it appears beyond doubt, from the law applicable to the case, that the city of San Francisco had no title. And I shall proceed to show that this is so:

1. By the decisions of this Court.

2. *By the decisions of the Board of U. S. Land Commissioners for California. [169]

3. By the decision of the Circuit Court of the U. S., for this circuit.

4. By the decision of the Supreme Court of the United States.

5. By the Spanish and Mexican law.

First, then, by the decisions of this State:

The first case in which the question was presented, was the case of *Woodward v. Fulton*, (1 Cal. 295). In that case there was no proof of ownership in the city of San Francisco, or in

the town or pueblo of that name, nor was it explained whence or how any title was acquired. The Court there held, that if the city had any title, it should have been proved—that not having been proved, it could not be presumed—and that the lands lying within the corporate limits of San Francisco, which had not, previously to the conquest of the country by the American forces, been granted by the Mexican government or its officers, constituted a part of the public domain of the United States. This decision was founded upon the general doctrine, that a plaintiff in ejectment must prove title under those under whom he claims, in order to show title in himself, and that in the total defect of proof that the Mexican nation had parted with its right, the Court could not presume that state of facts; consequently the legal presumption was, that at the time of the military occupation of California by the Americans, the title to the soil still remained in the Mexican government. In other words, all title being derived from the sovereign, no presumption could be indulged that the sovereign had parted with the title. If the fact existed, it must be proved. The Court say, page 306: "It is claimed that San Francisco, as the lawful successor of Yerba Buena, was what is termed in Spanish law, a pueblo; and that, being such, there was in some undefined manner, and under some vague system of things, vested in the people of the pueblo, or in the alcalde or justice of the peace, or ayuntamiento, as representative of the pobladores, an absolute title to a large tract of land, the limits of which have never, as yet, been ascertained farther than the city surveyor has been directed to run the lines of city lots. Whence or how that title was acquired, was not attempted to be explained on the argument; and I am not aware of any legislation, general or special, of Spain or Mexico, which vested the pueblo of Yerba Buena, or the town or city of San Francisco, with a title to a foot of land within their assumed boundaries."

The Court further say, pages 306-7: "It does not appear that San Francisco or Yerba Buena; was ever constituted a pueblo, or had the rights of one; a fact which, I think, should be established by proof, and of which Courts cannot and ought not to take judicial notice; and further, even admitting that it [170] was a *pueblo, there is still nothing in the case showing the boundaries of the pueblo, or that the lot in controversy lies within those boundaries."

Since that decision was made, the extensive and minute examinations which have been made, have proved utterly unavailing to show, either that any title was acquired by express grant from the sovereign, or that "any legislation, general or special, of Spain or Mexico, vested the pueblo of Yerba Buena, or the town or city of San Francisco, with the title to a foot of land within their assumed boundaries." On the contrary, very additional fact which has been discovered, every additional document which has been brought to light—the elaborate and learned investigations which have since been made into Spanish and

Mexican law—all have tended to establish the position then taken by the Court; until at last the proof of the correctness of that position has become so accumulated and clear, as no longer to leave any room for doubt in the minds of thinking and intelligent men, who have been at the trouble to inform themselves upon the subject, and who do not deem themselves forever committed to error, because they have once happened, inadvertently perhaps, to go astray.

The decision in *Woodworth v. Fulton*, was made at the December term, 1851. The doctrine of that case was reaffirmed in this Court in the subsequent cases of *Reynolds v. West*, 1 Cal. 322, 325; *Brown v. O'Conner*, Id. 419, 421, and in numerous other cases not reported, both in this Court, and in the inferior Courts of the State during the years 1850, 1851, 1852 and 1853. The same view was again taken of the law in the case of *Vanderslyce v. Hanks*, 3 Cal. 28, 45. In this case, the defendant claimed under a grant from the pueblo of San Jose, which was the oldest pueblo in California, and the best known, and contained the greatest population; so that it would seem, if the extraordinary doctrine of presumption, which I am combatting, could be properly applied in any case, it should have been applied to a claim arising under the pueblo of San Jose. But the Court say, (p. 45,) per HEYDENFELDT, J., "I now come to the consideration of the defendant's title. He claims by virtue of a grant from an alcalde of San Jose. The regularity of this grant is assailed on various grounds, but the view I have taken renders it unnecessary to consider them. To sustain this grant, it was necessary in the first place, that the lands in dispute had been the property of the town of San Jose. No title was exhibited establishing this fact, and the only evidence in relation to it, was derived from reputation as to the boundaries of the town." The learned Judge then proceeds to state that, inasmuch as this evidence derived from reputation was insufficient, the alcalde's grant could not be sustained. Several points are affirmed by the Court in the case last above cited.

*1. That a pueblo and town are the same thing in [171] Mexican law—for the Court at one time designates San Jose as a pueblo, and at another, as a town.

2. That where a party claims title under a Mexican pueblo or town, it is necessary to show "that the lands in dispute had been the property of the town;" that is, the ownership of the town must be proved the same as the ownership of any other individual under whom a party claims title.

3. That where no proof is produced establishing ownership in the town or pueblo, the Court cannot presume and decide, as matter of law, that the pueblo or town was the owner of the lands.

4. In this case, there is no presumption indulged, independent of proof, as to the limits of the town or pueblo, nor do we find the still more astounding doctrine, that whatever lands a local officer might see fit to give away to any person, were to be

presumed, in law, to be included within the limits of the pueblo or town.

5. We hear nothing of the doctrine that the grant of a lot in a pueblo, made by an alcalde, raises the presumption that the alcalde had authority to make the grant. The novel doctrine of presumption afterwards advanced, does not seem at this time to have occurred to the minds of the Court, and, therefore, the positions taken are in accordance with law.

But, again, in the case of *Leese v. Clark*, 3 Cal. 17, the Court holds a doctrine equally strict. In that case, the plaintiff claimed under a grant made by the Governor, of a water-lot at the embarcadero of Yerba Buena, (being near the very centre of San Francisco.) On the trial of the cause below, the plaintiff offered the original petition and grant, executed in proper form, in evidence, but the Court rejected the offer, whereupon a verdict and judgment were rendered in favor of the defendant. This Court, on appeal, affirmed the judgment. Mr. Chief Justice Murray delivering the opinion of the Court, says, after citing certain Mexican laws and regulations concerning the granting of lands, "I have cited these regulations to show that the alienation of the public domain of Mexico was a subject of careful consideration with that Government, hedged around with an infinity of restrictions for the protection of the sovereignty, and that the loose and careless conduct of her governors, in executing this trust, was not approved by the supreme government, although removal from the scene, and the insignificant value of the lands at that time, seemed to direct public attention from these abuses.

"To these regulations this Court can alone look, and by them every grant must be determined. Had we the power to discriminate, its exercise would be more dangerous, and productive of more injustice than the total inability to go beyond them.

[172] "If the officers of the Mexican government, to whom neglected the solemnities and formalities of the law, this Court is bound to take notice of it, and cannot shield those claiming under such titles from the necessary consequences of ignorance, carelessness, or arbitrary assumptions of power.

"The grant from Alvarado to Leese and Vallejo contains nothing but a petition and grant of the Governor. There is no map attached, no survey, record, or evidence, that the plaintiffs have ever been put in judicial possession, no act of the Territorial Deputation confirming the act of the Governor, or evidence that the grant, together with a map, were recorded in a book kept by law as a record of said grants, as provided in section ninth of the Act of 1828. But that these requisitions must be fully complied with, this Court has no doubt, without which severance of the land from the public domain, and a rigid adherence in all other respects, the title did not pass to the grantees, but remained in the government of Mexico.

"The title at best can only be considered as inchoate. It

passed with the map of the property of Mexico to the United States, who now hold it, subject to the trust imposed by the treaty of cession and the equities of the grantees."

And again, in the same case, the Court uses the following language:

"Holding, as we do, that the law of 1824, and the regulations of 1828, must be strictly complied with, that the title of the plaintiffs at best is inchoate and incomplete, and therefore insufficient to maintain ejectment, we are of opinion the Court below properly excluded it as testimony."

There are several things worthy of note in this case:

1. That, in granting lands to the city of San Francisco, the officer making the grant was obliged to follow strictly the laws and regulations which had been prescribed for that purpose by the Mexican government, and that any grant of a city lot, not made in strict conformity with the laws and regulations, would be held invalid.

2. That a party could not recover a lot in the city of San Francisco merely upon the strength of his petition and a Mexican grant, made in due form, in pursuance thereof.

3. That the land in controversy, although clearly situated within the limits of the then city of San Francisco, and what the Court has since recognized as the former pueblo or town of San Francisco, constituted a part of the "public domain" of Mexico, and that without a rigid adherence to the Mexican laws and regulations, the title did not pass to the grantee, but "remained in the government of Mexico," and had afterwards "passed with the map of the property of Mexico to the United States, who now hold it, subject to the trust imposed by the treaty of cession and the equities of the grantees."

- *4. In this case, as in *Vanderslyce v. Hanks*, we hear [173] nothing of the subsequent doctrine of the Court that they would presume, as matters of law, that there was a town; that any land granted was within the town; and that the officer had authority to grant; and that a simple grant, without any other evidence whatever, was sufficient to enable a party to recover in ejectment.

Thus, we see that the principle of the case of *Woodworth v. Fullon*, was sustained in this Court, and in all the inferior Courts, during the years 1850, '51, '52 and '53, and was supposed to be the established doctrine of this Court.

Against these decisions, stands the case of *Cohas v. Raisin*. In this case, the defendants had obtained possession of the lot from and under the plaintiff, and then neglected to perform their part of the very contract under which they had entered into possession. Whether the plaintiff had title or not, was immaterial, for the defendants had obtained possession from him, and still held possession under him, and therefore, they could not dispute or question his title; and besides, the plaintiff had only covenanted that he would execute a good warranty-deed and, whether he had title or not, he could, unquestionably, exe-

cute a good warranty-deed, upon the covenant of warranty, in which the defendants, if ever evicted, could have maintained their action. For, that there is no breach of warranty until there is an actual eviction, and that the covenant that the plaintiff will execute a good warranty title refers to the deed itself, and not to the title to the property, are rudiments in law. (See 4 Kent's Com. 471, and 20 Johns. 129.)

The case then was simply this: the defendants having procured possession from the plaintiff, they were estopped, so long as they retained such possession, from questioning the title of the plaintiff.

The facts of the case bring it within that class of cases, of which *Hoen v. Simmons*, 1 Cal. 119; *Turtar v. Hall*, 3 Id. 263; *Redman v. Bellamy*, 4 Id. 247; are examples.

In *Hoen v. Simmons*, the defendants claimed that the plaintiff had sold them the premises in question, and that they had taken possession on the faith of such contract; but that they had neither fulfilled nor offered to fulfill the terms of the contract which they set up. In a suit brought by the plaintiff to recover the premises, the defendants relied, in bar of a recovery, on want of title in the plaintiff. But the Court say: "The defendants having entered into possession, claiming under the plaintiff, and in subordination to his title, are estopped from questioning it."

In *Turtar v. Hall*, the plaintiff executed and delivered a conveyance to the defendant, of one hundred and sixty acres of land belonging to the United States, and delivered possession thereof to the defendant, and the latter gave his note, and [174] executed to the plaintiff a mortgage upon the same land. In a suit brought by the vendor and mortgagee, to enforce payment of the note and mortgage, the defendant set up that the plaintiff had no right, title, estate or interest in the premises, and had no power or authority to convey the same.

But the Court, per HEYDENFELDT, J., say: "The mortgage executed by the defendant operates an estoppel to the defense he has set up, according to well established principles of public policy, for the security of good faith and fair dealing, a party is not allowed to controvert the declarations which he has made by deed, or to deny the enforcement of rights which he has thus attempted to confer.

In *Redman v. Bellamy*, the defendant had executed a mortgage upon premises of which he claimed to be the owner. Having availed himself of the consideration for which he executed the mortgage, he set up, as a defense to an action of ejectment, brought by the purchaser, under a judgment in a suit of foreclosure, that he was not the owner, but that the title was in another person. But the Court, per HEYDENFELDT, J., say: "The plaintiff claims under a sheriff's sale. The execution was upon a decree of foreclosure of mortgage executed and given by the defendant. He is, therefore, estopped from setting up the de-

fenses attempted in this case." And the Court cite the above case of *Turtlar v. Hall*, as an authority in point.

These cases proceed upon the principle, that a person shall not be permitted to enjoy a right, and at the same time controvert or deny the validity of the title under which that right is enjoyed, and thus avoid the obligation which he has incurred. And the same principle is applied to the case of *Cohas v. Raisin*, and it is the only principle, either of law or ethics, which is applicable to the facts upon which the Court was compelled to pass judgment.

But the facts of the case did not involve the consideration of any, or either, of the matters thus stated to be involved. And this admission of the parties, that the plaintiff claimed under an American alcalde, upon which this statement in the opinion proceeds, has been shown to be wholly immaterial.

"The laws of Spain fully recognize the right of cities, towns, and villages, to acquire and dispose of real estate, subject to the royal regulations, which were made from time to time for their government."

Undoubtedly, the laws of Spain, like the laws of all civilized communities, recognized the right of cities, towns, and villages, as well as of individuals, to acquire and dispose of real estate, subject to the royal regulations, or, which is the same thing, subject to the laws. But what has this to do with the matter in hand? even conceding that matter to be the immaterial proposition which the opinion has just above announced as being in-*volved in the case. Because cities, towns, [175] and villages, had the right to acquire, does that prove that they did acquire in all cases? Does that prove that the town of San Francisco had acquired? And because they could "dispose of," according to law, does that prove that they could "dispose of," without law, or contrary to law?

I would, in all seriousness, ask what support for the doctrine sought to be sustained, can be derived from this law? In order to be of any avail to the opinion, the reasoning must be this: It is the will and pleasure of the King, that cities, towns, and villages shall retain their rights, revenues and municipal lands, therefore they have a right to part with them; but, says the King, it is our further will and pleasure, that no grants be made of such lands—therefore, a grant of such lands by an American alcalde is good. Again, says the King, we command that all grants of the same, or any part thereof, which we may make to any person, be of no value whatever—consequently, says the opinion, because grants by the King are void, grants by an American alcalde are valid.

The law cited in the last quotation of the opinion, as Law 1, tit. 16, lib. 7, of Nov. Rec., which is the same as Law 2, tit. 5, lib. 7. R., has been as often misunderstood and perverted as it has been cited in our Courts. The law, when correctly translated, is as follows:

"Our will and pleasure is to preserve to our cities, villas, and

lugares, their rights, revenues, and *propios* and not to make any grant of anything thereof: Wherefore, we command that the grant, or grants, of them, or any part thereof, which we may make to any person whatever, be not valid."

This law speaks of such things only as have been already acquired by cities, villas, and *lugares*, but it confers no new property or rights upon the places spoken of. So, also, when the law guarantees to the towns their privileges, offices, uses, customs, and franchises, (as in Laws 1, 2, 3, 4, and 5, tit. 2, lib. 7, Rec.; and Law 3, tit. 5, lib. 3, Rec.) or rights, revenues, and *propios*, as in Laws 1 and 2, tit. 5, lib. 7, Rec., (the first being the law quoted in the opinion,) or *aldeas*, fortresses, etc., (as in Law 6, tit. 5, lib. 7, Rec.), it speaks of those things which have been expressly granted to them, or acquired by some legitimate title, and is only in affirmance of the principles of natural justice equally applicable to the rights of individuals and of corporations; and when it gives a solemn pledge to preserve to the towns and cities in Spain, their *terminos comunes* or *valdios*, *ejidos*, *montes*, and *pastos* (as in Laws 1 and 2, tit. 7, lib. 7, Rec.,) and that the sovereign will not sell any part of the *terminos publicos*, or *valdios*, (as in Laws 8 and 10, tit. 5, lib. 7; and in Law 11 of the same title, which refers to the solemn contract between the king and the people, known as the "*Condicion de Mil-*

[176] *lones*;" it has exclusive reference to vacant *lands in Spain, of which the citizens of the towns had enjoyed the use in common for many centuries, and proposes the perpetuation of a system of policy, in reference to the public lands, which was completely abandoned in 1813.

These laws, with others of a like nature, so frequently cited in our Courts, recognizing certain rights, privileges, exemptions, and property, in towns, refer to such rights, etc., as had been conferred by special and formal acts of the legislative power, and prove this, and this only,—that the sacred right of property, founded in the law of nature itself, was respected by the sovereign, whether vested in individuals or corporations.

For all the rights or property which individuals, towns, or corporations had acquired, must appear in the documents by which they were acquired, or in the general guarantees of the common laws of Spain, extending alike to individuals, towns, villas, cities, and corporations.

But again: "The manner of granting municipal lands to towns, and the manner in which they were allowed to rent or dispose of them, depended upon royal regulations, which were changed from time to time. At one period they could grant or sell them, and at another, they could only lease them, either for a term of years, or forever, the rents forming a fund for municipal expenses. But these grants, sales, and leases, were always made by the municipal authorities, with the permission of the crown; but neither the King nor the crown-officers could themselves dispose of the lands once granted or acquired by the towns." Now, if this statement has any applicability at all,

it tends to overthrow the very doctrine in support of it which it is cited. There is no doubt but the manner of granting lands to towns, and the manner in which they were allowed to rent or dispose of them, depended on regulations of the King, or of the legislative power. But such a doctrine cannot be cited for the purpose of establishing the fact that a grant of lands had been actually made to San Francisco; or, if such grant had been made, that an alcalde had the power to dispose of lands thus granted, in violation of regulations of the King, or legislative power.

To proceed, "In forming new towns, the Viceroy was directed, not only to mark out to them common lands, but also to give municipal lands (*propios*) to those who had none, the proceeds of which will serve to pay the corregidores." But is it to be inferred, because Viceroy was directed to give municipal lands to new towns, that, therefore, a Viceroy, or anybody else, had given municipal lands to San Francisco?

There is, however, another difficulty which occurs before any such inference can be deduced from the authority cited—and that is, the Spanish word *propios* happens to be incorrectly translated "municipal lands." The term has a much broader signification.

"In some of these orders and decrees, the municipal [177] authorities were allowed to alienate the municipal domains only in case such measures were necessary for the good of the towns." In what orders or decrees? Must we infer, because the municipal authorities of some towns were, by express order or decree, authorized to alienate municipal lands, in case such alienation was for the good of the town, that, therefore, the municipal authorities of San Francisco, might, without any order or decree, alienate the lands of San Francisco, not only where it was not necessary for the good of the town, but where it was highly prejudicial to its interests?

"On the 6th of August, 1834, the Territorial Deputation of California authorized ayuntamientos of towns to apply for (*egidos*) common lands, and (*propios*) municipal lands, to be assigned to each pueblo."

"Authorized ayuntamientos to apply for," etc. But how does that help the argument? Does it necessarily follow, because ayuntamientos had the authority to apply, that they did apply? And further, that their application was granted; and was followed up by an actual assignment of the lands, by actually marking them out, and specifically dedicating them for each particular purpose—some for *propios*, others for *egidos*, others for *dehesas*, etc., in the manner in which the law required these things to be done? Every individual was authorized to apply for a grant of lands to the government; but every person did not apply, and not every person who did apply, was successful in his application.

"By the law of August 9, 1834, article fifth, municipal lands were to be granted to the new pueblos formed out of the secularized mission."

"Were to be granted," etc. But were they granted? The question is not so much what might be, as what was.

"On the 3d of November, 1834, the Territorial Deputation of California decreed that the Governor should direct the election of an ayuntamiento in the portido of San Francisco, to be composed of one alcalde, two regidores, and one sindico. This ayuntamiento was directed to mark out, in the shortest time, the boundaries or limits of its municipality.

If an alcalde's grant be good, of a lot of land within the present limits of the city of San Francisco, upon the ground of the existence of an ayuntamiento for the partido of San Francisco, it must be equally good of a lot in any other portion of the territory within the jurisdiction of the ayuntamiento. But what would be said of a grant by an alcalde of San Francisco, of a lot of land in Sonoma or Marin counties. Yet the validity of such a grant is a necessary deduction from the doctrine of this opinion in *Cohas v. Raisin*, 3 Cal. 443.

The truth of the matter, however, is that this action of [178] the *Territorial Deputation, the election of the ayuntamiento, and all the subsequent actions of that body, had nothing to do with the municipal organization of any town, but was a temporary organization for the entire northern portion of the territory.

Further, at the date of this proceeding of the Territorial Deputation, the power of establishing pueblos, or towns, did not rest with the deputation; it could only be exercised by the supreme government. The deputation could merely take the initiative, and their recommendation was to be transmitted through the proper authorities to the supreme government, for its final action.

But further, the proceedings of the Territorial Deputation do not purport to direct the establishment or organization of a pueblo, or town, or villa, or city, or any other municipal body—it simply directs that the *partido*, or district of San Francisco—thus speaking of something already existing—proceed to the election of a constitutional ayuntamiento, to be established in the presidio of that name.

Above all, the proceedings of the Territorial Deputation, and the action had in pursuance thereof, were, at the utmost, but the organization of a political body, charged with the government of a limited district of country, and were in no wise connected with, or followed by, a change in the property to a single foot of land.

The original decree, and the whole thereof, is as follows:

"1. That the political chief direct the district (*partido*) of San Francisco to proceed to the election of a constitutional ayuntamiento, to be established in the presidio of that name, to be composed of one alcalde, two aldermen, (*regidores*), and one town-attorney, (*sindico procurador*), conforming, for that purpose, in all respects, to the Constitution, and the laws of the

18th (12th) of July, 1830. 2. That report be made through the proper channel to the supreme government, for an approval."

• And the original order of Figueroa is as follows:

"SEAT OF THE POLITICAL GOVERNMENT }
OF UPPER CALIFORNIA."

"The most excellent Territorial Department, using the powers conferred on it by the law of the 23d June, 1813, on yesterday passed the following instruction:

[Here follow the resolutions of the department, as copied above.]

"And I transcribe it to you for your information and compliance, recommending that the election be carried into effect on the day appointed by said law of the 12th of June. I also notify you that the ayuntamiento, when installed, will exercise *the political functions with which you have [179] been charged, and the alcalde the judicial functions which the laws, for a want of a Judge of letters, confer upon him, you remaining restricted to the military command alone, and receiving, in anticipation, the thanks due for the prudence and exactness with which you have carried on the political government of that demarkation. God and Liberty.

"November 4th, 1834.

"JOSE FIGUEROA.

"To the Military Commandant of San Francisco."

In what manner this direction, concerning the demarkation of boundaries of a municipality, came to be inserted in Wheeler's Land Titles, I am at a loss to conceive. It is certain this clause is not contained in the original, either of the decree, or of the order.

But, suppose such direction was contained in the decree, or order, or both of them, and, moreover, suppose the ayuntamiento did mark out the boundaries, what then? Does it result from that, that the *partido*, pueblo, district, or town, became the owner of any of the land within, or without, the boundaries thus designated? No law has ever been produced sanctioning such a supposition; no authority has been cited, nor can be—none such exists.

"And it must be presumed," continues the opinion, (in *Cohas v. Raisin*.) "that the ayuntamiento did its duty in marking out boundaries as directed, especially as they immediately commenced making grants of the lands." (5 Cranch, 242; 3 Wheat. 594; 3 Peters, 320.)

The foundation of this superstructure, raised by presumption, is overthrown by the consideration, that no direction was given to mark out boundaries, as the opinion erroneously supposes. This has already been shown. But if it were otherwise, this doctrine of presumption does not apply, and the authorities cited in the opinion, do not sustain it. The first case cited in the opinion is *Taylor v. Brown*, 5 Cranch, 234, 242.

The next case cited in support of this doctrine of presumption is *Craig v. Radford*, 3 Wheat. 5, 94. The presumption in this case, as in *Taylor v. Brown*, was of the warrant being in the hands of the surveyor, from the fact of the survey—the facts being the same as in *Taylor v. Brown*, and arising under the same law, and the decision of the Court being based upon that case.

The next and last case cited is that of *Stringer v. Lessee of Young*, 3 Pet. 320. This case neither decides nor treats of the doctrine of presumption, in any respect; and is no authority, either way, upon the point under discussion, unless a bare reference, in the decision of the Court, to the case of [180] *Taylor v. Brown*, *in support of another point, be deemed authority in support of this doctrine of presumption.

How much more in accordance with law are the remarks of the Chief Justice in *Leese v. Clark*, 3 Cal. 25, 26, speaking of the regulations of the supreme government, of November 21, 1828.

But, upon principle, who ever heard of a party being presumed to have done an act barely because he was required or directed to do it? A party is required to prove that he has done the act which the law, or his superior authority, has directed him to do, when the doing of that act is necessary to sustain some right which is claimed. The law would hardly be guilty of doing so foolish a thing, as to direct an act to be done, and then presume that it had been done, from the fact of its having directed it.

But, as another reason against this presumption that the ayuntamiento marked out the boundaries is, that as late as May 1st, 1844, there were no fixed and determined limits; for, in a grant made on that day by Governor Micheltorena to Francisco and Ramon Haro, of the potrero of San Francisco, the following language is used: "I have resolved to permit them to occupy the potrero mentioned, subjecting themselves to the measurement which shall be made of the *egidos* of the establishment of San Francisco." (Wheeler's Land Title, p. 12.) The author cited very justly remarks, (Id. p. —) "By this, it appears the lands of the town had not been marked out."

"In 1839, it was thought by the Governor, that the number of the population in San Francisco, being greatly reduced by the secularization and partial ruin of the Mission, was not sufficient to authorize the maintenance of an ayuntamiento, and *juezes de paz* were elected in place of that body, as directed in the law of March 17th, 1837."

"These *juezes de paz* commenced making grants of one-hundred-vara lots, in the same manner as had been done by the *alcalde*. But a question now arose, whether the justice could, under the law of 1837, (*vide* acts, 180, 186,) exercise that power in place of the *alcalde*, without a special ordinance of the departmental junta. To remove this doubt, a special ordinance was passed, and communicated by the governor through the

prefect, but limiting the grants by a justice, to fifty varas square."

These justices of the peace had the same authority *per se*, which the ayuntamiento had, to grant lots, that is, none at all.

As suggested above, these lands had been the lands of the town, or other than part of the national domain, the justices of the peace should, and would have made their grants by virtue of some other authority than that of the departmental government—that is, they would have obtained their authority, and so expressed it, from the town, the owner of the lands.

We now come to a new era. On the 7th July, 1846, *pos- [181] session was taken of Monterey, and subsequently, of the rest of the territory. The President of the United States, as commander-in-chief of the army, directed his subordinate military officers to organize a civil government, for the purpose of preserving the domestic peace and quiet of the country, and preventing a state of anarchy. This was no more than is done in all cases of an armed occupation of a country, in the condition in which California then was; for the old government being broken up, a new one was absolutely necessary to subserve the purposes of police, and prevent or punish the commission of crime. The office of alcalde of San Francisco was filled by an American citizen, and continued thereafter to be filled by an American, until the office was finally abolished in 1850. These officers, as well as all others, except such as were appointed by the American military governor, or by the President of the United States, were elected by American citizens, settled or stopping, either as soldiers or otherwise, at the place called Yerba Buena.

The decision in *Cohas v. Raisin* assumes :

1. That there was an organized town or municipal government, extending over, and confined to, the particular locality now known as the city of San Francisco.
2. That a grant, or that grants of definite parcels of land, had been made by the Mexican government to such town.
3. That such grant or grants were of lands situate within the present limits of the city of San Francisco.
4. That such grant or grants embraced all the lands within the limits of the present city.
5. That any grant made by an alcalde was within the boundaries of the assumed Mexican town or pueblo.

The same question has been passed upon by the Circuit Court of the United States, for this circuit. In the case of *Field v. Seabury et al.*, tried before the Circuit Court in 1856, the parties claimed under American alcalde grants. The Court, Judge MALLISTER presiding, charged the jury that the grants were absolutely void—that the alcalde had no power or authority to grant the land, which land constituted a part of the public domain of Mexico before the war, and had passed with the conquest to the United States—that the parties were chargeable with notice of such want of power and authority in the alcalde, and, therefore,

that the possession was not even colorable. And, on error to the Supreme Court of the United States, although the judgment of the Circuit Court was reversed on another ground, the Court approved that portion of the charge of the Circuit Court, which related to the point now in issue, and declared that, "in this the Court was correct."

"The Spanish word *pueblo* means, in its original signification, the people or population generally; it also means the in-
[182] habit-ants of a particular place, but in its more restricted signification, it means a town or village, or any collection of persons residing in the same place, and corresponds to our general term town, as applied to similar collections of houses and people, whether of greater or less extent. This last is the sense in which the word is used in the various laws and official documents to which reference will be made in the course of this examination."

A brief historical notice will, not inappropriately, commence this portion of my argument. (*Leyes Fundamentales de la Monarquía Española*, by R. P. Fr. Maguin Ferrar, pages 145, 147, vol. 1, and note 2 to title 8, lib. 1, *Fuero Viejo de Castilla*, by Asso y Manuel, and the "adiciones" to the preliminary discourse to this code by Pedro Jose Pidal.

It is a necessary deduction from the foregoing brief sketch, that pueblos or settlements, at their origin and for some centuries after, had no rights, political, judicial, or of property, greater than the mass of their fellow-citizens—and that they commenced acquiring additional privileges by receiving from the sovereign *fueros* or franchises—and that whatever property they required, must have been acquired by them from the former owner, the same as by any natural person. If the pueblo had grown up on the land still retained by the sovereign, he might, at the same time he granted a *fuero*, transfer to the pueblo such portions of land as he deemed proper, or none at all. But if the pueblo had sprung up on the land which had been allotted to one of the lords, the sovereign could not, when he granted the *fuero*, convey any right whatever to any lands—but then, it was necessary to procure it by grant from the lord, the owner thereof. On the other hand, though the lord might bestow upon a settlement or pueblo on his lands, the title to a portion of the soil, it was beyond his power, as has been stated, to give to the settlement a corporative existence; for, it was a well settled principle of law, that no corporation, of any class, municipal or otherwise, could be formed, without express royal license and authority. (See *Instituciones del Derecho Público General de España*, vol. 1, page 273; L. 1, tit. 15, lib. 2, R.; L. 4 and 7, tit. 4, lib. 2, R. I.; L. 2, tit. 5, lib. 3, N. R.)

To the same effect is Gregorio Lopez on L. 9, tit. 28, p. 3. "The privileges of incorporation," (says Perez, *Compendio del Derecho Público y Comun de España*, vol. 1, p. 332,) "or town, are, firstly, to have defined *terminos*, the destination whereof is, in Spain, the exclusive property of the sovereign;" and again (p.

331) "the distribution of the land is made by authority of the King. They never pertained by right to those who occupy them, until the King has granted them," etc.

Before proceeding further, let us ascertain what is meant by the *propios, rentas, arbitrios, solares, valdios*, etc., of towns. The *solares* in newly founded towns in Spain, as well as in the New *World, were small lots or parcels of land within the [183] *terminos* of the town, intended for *repartimiento* or distribution among actual settlers, and specially assigned and set apart for that purpose. "Let the *solares* be distributed by lot to the *pobladores* or settlers, continuing from those which correspond to the *plaza mayor*, and let the rest remain for us to make grant thereof to those who shall afterwards come to settle, or whatever our pleasure may be. (L. 11, tit. 7, lib. 4, R. I.; see also tit. 17, lib. 7, N. R.; Elizondo Practica Forense Universal, v. 5, p. 233; 1 Feb. Mej. 305; Law of March 20, 1837, art. 9; Biblioteca de Legislacion Ultramarina, v. 5, p. 215.)

We have already seen that, by the laws of Spain, not only is it the exclusive prerogative of the King, (or, since 1812, of the Cortes), to grant the title of *villa* to any place, and to designate the *termino* or demarkation of its jurisdiction, but that all the rights, privileges, property, and exemptions which it can claim, must be derived from the same source. The same principle is declared in the law of 1627, which is L. 6, tit 8, lib. 4, R. I.

The law is sixty-four years later in date than L. 2, tit. 7, lib. 4, R. I., and must be considered as modifying it, if any real conflict exists between them.

We accordingly find that when it was proposed by the inhabitants of the pueblo of Manzanillo, in Cuba, to establish local authorities at that place, erecting themselves into a separate municipality, the *expediente* formed for that purpose had to be passed to the Council of the Indies, in order to obtain the royal sanction.

From this document several important conclusions are deducible in harmony with the laws and authorities before cited.

1. That no power short of the sovereign could erect a municipal corporation at Port Royal, give to the inhabitants a separate jurisdiction and local government, and segregate them from that of Bayamo, in whose *termino* they had been comprehended, though fourteen leagues (nearly forty miles) distant from it. The Captain-General of Cuba, though possessed of the *omnimodas facultades*, the plenary powers of the Viceroy, could not even take the initiatory steps, so as to create an inceptive right, but forwarded the *expediente* directly to the king, by whom the initiatory orders were given. This is a practical exposition of L. 6, tit. 8, lib. 4, R. I., as late as 1830-3.

2. That a municipal corporation may be fully established with its *termino*, or jurisdictional limits marked out and defined, and its ayuntamiento and other authorities fully installed, without giving that corporation any shadow of right to lands within its limits, or to any other property whatsoever.

The right of common, that is the common use and enjoyment, which the *vecinos* have in the *terminos publicos* and *consejiles* of the cities, *villas* and, *lugares*, was only a precarious servitude exist-ing by sufferance in the royal lands remaining undisposed of, which did not impair the sovereign's full and absolute property in the lands, nor prevent the free disposition thereof by him—a right which was fully exercised by the Cortes of January 4th, 1813. The *terminos* or *consejiles*, or the commons of towns, embraced all the public and vacant lands in Spain.

The uniform policy was opposed to their alienation by the crown, to whom the property therein pertained. (L. 8, 9, 10, tit. 21; L. 1, 2, 3, tit. 23; and tit. 24-5, lib. 7, N. R.)

In America, shortly after its discovery and first settlement, the use and enjoyment of all the vacant public lands were declared to belong to the citizens in common, (L. 5, 6, 7, 8, and 9, tit. 17, lib. 4 R. I.), which are understood to be restricted in the same manner as in Spain, to the citizens of the respective towns, within whose *termino*, or demarkation, the said public and vacant lands may exist, unless some special provisions have been made to the contrary, as in L. 3, tit. 8, lib. 4, R. I.

Although the laws contained in titles 21, 22, 23, 24, and 25, lib. 7, R., show that the general policy of the Spanish government was opposed to the alienation of the public lands, or their conversion to any other use than that of common of pasturage, they do not show nor contain any evidence whatever, that the towns or citizens thereof, individually or in common, owned anything, much less any lands, except such as had been conveyed to them by the sovereign or other proprietor.

Is the question asked, have towns, then, no property by virtue of their establishment, in Mexico and other Spanish countries—none but such as they acquire in the same mode as natural persons? I answer, none whatever. It was, no doubt, contemplated by the colonization laws of Spain and Mexico, that lands, for certain purposes, should be assigned to towns, and it is clearly contemplated by the same laws, that lands should be given to individuals. But in many, perhaps the majority of cases, both the one and the other are found destitute, because they did not get any grant from government, or because they had not the means to buy them, or, because they did not want them.

The royal regulation of October 24, 1781, made especially for California, provides (art. 4) that "the *solares*, which may be granted to new *pobladores*, must be assigned by the government in the sites and with the extension corresponding to the situation of the land where the new pueblos may be established," etc.; (art. 5) that "the distribution which shall be made of the said *suertes*, as well as of the *solares*, must be made in the name of the King, our lord, and shall be executed by the government with equality and in proportion," etc.

There is another commentary, of somewhat modern date, on

the laws of Spain and the Indies, which I have cited, to show that the landed property of the sovereign is not changed, or in *any manner qualified or restricted, by any territorial demarkations whatever. The city of Havana, in the Island of Cuba, was founded in the year 1515. In its municipal ordinances, formed by the King's command, and approved May 27, 1640, authority was given to the ayuntamiento (see articles 63 to 72) to grant building lots, as well as lands outside the pueblo for keeping cattle, etc. (*Legislacion Ultramarina*, vol. 3, p. 410.)

By a royal *cedula* of November 23, 1729, they were prohibited from exercising this authority any longer. (*Biblioteca de Legislacion Ultramarina*, v. 6, p. 43.)

The regulation of November 21, 1828, contains the authority for the distribution of lands, in towns as well as elsewhere, in the territories of the Mexican republic. It is delegated by the supreme government to the *gefes politicos*, and Territorial Deputations, and these have, in their turn, delegated the power, with such restrictions as they have thought proper to impose, to other inferior authorities.

Subsequent to the regulation of 1828, and after the establishment of the Constitution of 1836, the power to regulate the distribution of lands in towns, was conferred upon the prefects, (law of March 20, 1837, article 77,) a provision which was adopted by Congress from the Constitution of the State of Mexico, (article 155.) The sixteenth section of the general Colonization Act of the Mexican Congress, of August 18th, above referred to, provides that, "the government, in conformity with the principles established in this law, shall proceed to colonize the territories of the republic." The President, by the regulation of November 21, 1828, committed to the Governors and Territorial Deputations a portion of the authority which the law confers on the government alone.

It is true that poblaciones (towns) are not permitted to be founded without license from the supreme power of the State, (*Compendio del Derecho Publico y Comun de Espana*, vol. 1, p. 330; *Ordenanzas de Tierras y aguas*, p. 80.) But the prohibition or the license to form poblaciones has nothing to do with the property in the land which may be occupied for that purpose. That must be acquired from the lawful owner. A simple reference to the archives of the Departmental government, and to the records of grants made prior to the American conquest in the place called Yerba Buena, and in the secularized mission of San Francisco, would set us right on this point. The local authorities, or municipal, of the mission, and so-called pueblo of San Francisco, by whom these grants were made in the two places referred to, never pretended to have any inherent power or authority, *ex officio*, to make them, much less did they claim for the town any property in the lands granted, but acknowledged that the authority was derived from the Departmental government, taking especial care to have this appear on [186]

record in the book of protocols, for the security of the respective grantees.

As a conclusion from the above propositions, we claim, that, after the limits of towns have been legally established, which can only be done by supreme authority, the sovereign remains the absolute owner of all the lands within those limits, to which a legitimate title cannot be shown by individuals or corporations; that, as such, he may freely donate, or distribute them; that he may altar, restrict, or enlarge the limits, once assigned to any town, or revoke them, at pleasure; and, that no town can acquire any right, even to the use of the lands embraced in them, as against the sovereign, unless by special grant, or immemorial prescription, that is, in the same manner as any individual, or other corporation; and that the right of common, which the citizens enjoy, though exclusive of those other towns, is not in exclusion of the sovereign's right of property and possession, and, consequently, the only acts which the municipal authorities can do, affecting these lands, are such as are purely administrative, and belong to the local jurisdiction conferred by the charters.

Saunders & Hepburn, for Respondents.

No brief on file.

MURRAY, C. J., delivered the opinion of the Court.

This was an action of ejectment, brought to recover the undivided half of two town lots in San Francisco.

The first error assigned is, that the Court admitted in evidence the writ *venditioni exponas*. The error is said to arise from the fact that the return of the sheriff upon the writ showed that he had levied upon and sold the property, by virtue of the writ, when it had already been levied upon by an execution which had expired. The writ of *venditioni exponas* is a simple order of Court, directed to the officer, commanding him to sell the property already levied on. It is no authority to levy, and the recital in the return that he had levied and sold by virtue of the writ, would be unimportant, when it appeared that the property had been previously levied upon, and that the writ only directed the sale thereof. Admitting that the officer, through mistake of the nature of the writ, had thought proper to levy upon the property, this unnecessary act on his part would not vitiate the sale, which would have been perfectly regular without it. (*Smith v. Morse*, 2 Cal. 524.) In addition to this, the irregularity of the sheriff's proceedings would not defeat the sale. (*Smith v. Randall*, 6 Cal. 47.)

The next error alleged is, that the description of the lots in the sheriff's return is insufficient. They are described by reference to the official map of the city, as lots one hundred [187] and forty *and one hundred and forty-one, which we suppose is sufficiently certain, for all practical purposes. Again, it is contended that the plaintiff cannot maintain an action

of ejectment, as tenant-in-common for an undivided half interest. It is said that tenants-in-common should sue for partition, or unite in a conveyance to one party, for the purpose of bringing suit.

We have repeatedly held, that tenants-in-common must sue separately, for the recovery of real estate, and we know of no rule which would compel a party to divest himself of, or alter his estate, for the purpose of asserting his title thereto: Again: it is said that the jury found a special verdict, showing the value of the permanent improvements, which should have been set-off against the damages, under the two hundred and fifty-seventh section of the Practice Act. There was no application for any such relief, the defendant claiming under the Act of 1856, for the relief of settlers, which has already been held unconstitutional by this Court; besides which, the improvements were made after the commencement of the suit.

The next error assigned is, that the Court charged the jury, that if they found the Limantour claim fraudulent, they should find for the plaintiff. This instruction was not erroneous, under the particular circumstances. The defendant did not attempt to connect himself with the Limantour claim, in any way, and the question, whether that grant was fraudulent or not, had been distinctly made before the jury.

The objection that the conveyances through which the plaintiff deraigned title, were not properly acknowledged, is untenable, as the defendant does not claim as a subsequent purchaser, and there is no privity between his pretended title and that of the plaintiff.

The argument of the appellant assumes, first, that the city of San Francisco was not the owner of the premises in controversy at the date of the sale thereof to the plaintiff, *i. e.*, that the fee of the land was not in the city, but remained in the government; and, second, conceding that the city had some estate, right, or interest in the land, it was not subject to sale on execution.

The argument consists mainly in reference to the case of *Woodworth v. Fulton*, 1 Cal. 295, and in a review of the case of *Cohas v. Raisin*, 3 Cal. 443, in which the decision of the former case was overruled. In reference to the latter case, it is due to myself to say, that I was absent at the time it was argued, but learning on my return that it had been submitted on the questions upon which it was afterwards decided, I wrote a special concurrence. That concurrence proceeded on the ground that San Francisco, at the date of the grant in question, was a pueblo, and by the laws of Spain and Mexico was the owner of municipal lands, which might be disposed of by her alcaldes or other municipal officers; and, second, that the Act of Congress of 1851, "to settle private *land-claims in California," operated a [188] grant to the city of San Francisco of all the lands within her boundaries in 1846. So that whatever the title of the United States might have been at the time of the treaty, the city of San

Francisco, if she had any municipal lands, although the title before that time was inchoate, became the absolute owner thereof, in fee.

I shall endeavor to maintain these two propositions in this opinion, and to establish at the same time, (conceding that the opinion of *Cohas v. Raisin* is not law,) that this Court is bound by that opinion on the principle of *stare decisis*, and that it would be a violation of every principle of morality and justice to disturb it at this late day.

In such cases, Courts are permitted to exercise a wide discretion, and judges are not expected or required to overturn principles which have been considered and acted upon as correct, thereby disturbing contracts and property, and involving everything in inextricable confusion, simply because some abstract principle of law has been incorrectly established in the outset. The books are full of cases in which learned judges have acknowledged the errors committed by themselves or their predecessors, and at the same time refused to overthrow the rule established. That Judge, who, from petty vanity, and the sake of showing himself more wise and learned than his predecessors, would overturn a rule which for years has settled the rights of property, should be regarded as the common enemy of mankind, and unworthy of the high trust that had been confided to him.

I now proceed to examine the question whether San Francisco was a pueblo, and whether in that capacity it was the owner of municipal land, with the disposition of which her officers were invested.

At an early period after the conquest of Mexico, regulations were made by the Spanish Crown for the reward of further discoveries, and the settlement of the country. These decrees are collected in the *Recopilacion de las Indias*.

A regulation was promulgated in 1523, to be found in Liber 4, title 7, law 7, of the Laws of the Indies, which authorized grants on certain conditions, to the founders of towns and pueblos. It is as follows: "The tract of territory granted by agreement to the founders of a settlement shall be distributed in the following manner: They shall, in the first place, lay out what shall be necessary for the site of the town and sufficient commons, and abundant pasture for the cattle to be owned by the inhabitants, and as much besides, for that which shall belong to the town (*proprios*). The balance of the tract shall then be divided in four parts; the one to be selected by the persons obligated to form the settlement, and the remaining three parts to be divided in equal portions among the settlers." Law 11, same

title, provides as follows: "The lots shall be distributed [189] among the settlers by lot, beginning with those adjoining the main square, and the remainder shall be preserved, so as to give as rewards to new settlers, or otherwise, according to our will, and we command that a plan of the settlement be always made out." Law fourteenth of same title

further provides: "After having laid out a sufficient quantity of land for commons of the town (*exido*) conformably to what is provided in that behalf, the persons authorized to make the discovery and settlement, shall lay out reservations, (*dehesas*), adjoining the commons, (*exidos*), for oxen, horses, and cattle, to be slaughtered, as well as for the ordinary number of other cattle, which the settlers are bound by law to maintain, and a good deal more besides, which shall belong to the council, and the remainder shall be laid out for cultivation, in tracts equal in number to the town-lots contained in the settlement, and be drawn by lot. And if there be any land suited for irrigation, it shall also be distributed by lot in the same proportion, to the first settlers, and the remainder shall remain vacant, that we may grant them to new settlers. From these lands the Viceroy shall separate those which appear to be fit for reservations (*propios*) for the settlements which have none—the proceeds of which will serve to pay the *corregidores*, leaving always sufficient commons, reservations, and pastures, as is prescribed above, and let it be so executed." (2 White, 47.)

We have thus seen that the law of 1523 authorized the formation of towns with *exidos* (commons), and *propios*, municipal lands, the title to which was to be vested in the inhabitants of the towns. It required a further regulation to fix the extent of the pueblo.

This was done in 1538, by a decree, which is found in Lib. 4, tit. 5, law 6, of the Laws of the Indies, to the following effect:

"If the situation of the land be adapted to the founding of any town, to be peopled by Spaniards, with a council of ordinary *alcaldes* and *regidores*, and if there be persons who will contract for their settlement, the agreement shall be made upon the following conditions: That within the prescribed time, it shall comprise, at least, thirty heads of families, each of whom to possess a house, ten breeding cows, four steers, etc.; he shall, moreover, appoint a priest to administer the sacrament, who, the first time, shall be of his choice, and afterwards according to our royal patronage; he shall provide the church with ornaments and articles necessary for divine worship; and he shall give bond to perform the same within said period of time; and if he fail in fulfilling his agreement, he will lose all that he may have built, worked, or repaired, which shall be applied to our royal patrimony, and incur the forfeiture of one thousand ounces of gold to our chamber (*camera*); and if he should fulfill his obligations, there shall be granted to him four square leagues of territory, either in a square, or lengthwise, according to the quality of the *land, in such a manner that when [190] located and surveyed, the four leagues shall be in a quadrangle, and so that the boundaries of said territory be at least five leagues distant from any city, town, or village, inhabited by Spaniards, and previously settled, and that it cause no prejudice to any Indian tribe, nor to any private individual."

Law seven, of same book and title, declares: "If any one

should propose to contract for a settlement in the prescribed form, to consist of more or less than thirty heads of families, provided it be not below ten, he shall receive a grant of a proportionate quantity of land, and upon the same conditions."

We have thus seen that any individual might become the founder of a town.

A further regulation was made, authorizing the heads of families to unite and form a pueblo on the same conditions. It is law ten of the same book and title, as follows: "Whenever particular individuals shall unite for the purpose of forming new settlements, and among them there shall be a sufficient number of married men for that purpose, license may be granted to them, provided there be not less than ten married men, together with an extent of territory proportioned to what is stipulated, and we empower them to elect, annually, from among themselves, ordinary *alcaldes* and officers of the council."

In all these cases, after 1538, the quantity of land dedicated or granted for the purpose of a town, was four leagues, measured from the principal square, one league in each direction, when the situation of the ground admitted of it.

Under these regulations, most of the towns were settled in Mexico, except in a few cases, when there were special grants.

In Coahuilla and Texas, after the revolution in 1821, as it was a matter of doubt whether the Spanish regulation remained in force, a decree was passed that the new towns, settled after the revolution, should have granted to them four leagues, the same as had been previously granted to the old towns.

In addition to the formation of towns by grant to founders, and to families united voluntarily for that purpose, the Viceroy and Governors had the power to found and organize towns given by a decree of the King, Don Carlos, in 1523. It is Law 1, book 4, tit. 13, of the Laws of the Indies, to the following effect:

"The Viceroy and Governors, being thereto authorized, shall lay out for each town or village which shall be newly founded and peopled, the lands and lots which they may require, and the same shall be granted to them as *proprios*, without prejudice to third parties. They shall transmit to us information of what they shall have laid out, that we may order the same to be confirmed."

The royal ordinance of 1754, declares: "That from the date of this, my royal order, the power of appointing sub-dele-
[191] gate *judges to sell and compromise for the lands and uncultivated parts of the said domains, shall belong thereafter exclusively to the Viceroy and Presidents of my royal audiences of those kingdoms who shall send them their appointments or commissions, with an authentic copy of this regulation."

The second article provides, "But in regard to lands of community, and those granted to the towns for pasturage and commons, no change shall be made, the towns shall be maintained in the possession of them, and those that may have been seized shall be restored to them, and their extent enlarged according to the wants of the population." (2 White, 63.)

This is a clear recognition of the rights of the town to the municipal lands. In the instructions to the intendentes, (2 White, 70, dated in 1784), directing them to make grants of lands, it is said, "And as respects the royal lands, without prejudice to such commons, as by the provisions of Law No. 8, ought to belong to each town or corporation."

It is contended by the counsel for appellant, that Law 1, of title 16, liber 7, of the *Novissima Recopilacion*, quoted in the opinion of *Cohas v. Raisin*, applies only to old Spain, and not to the Indies.

If this were true, it only shows what was the tendency of the law in the Indies, and is a mere repetition of what was repeatedly enacted for Spanish America. The decree is: "Our will and pleasure is, that the cities, towns, and villages, shall retain their rights, revenues, and municipal domains, (*propios*,) and that no grants be made of them; wherefore, we command that all grants of the same, or any part thereof, which we may make to any person, be of no value whatever."

The quotations already made from the laws of the Indies, show that the same principle was repeatedly affirmed with reference to pueblo lands in Spanish America.

A special regulation, however, was promulgated in reference to towns in California, and especially in reference to those places settled as Presidios. In 1791, Pedro de Nerva possessed the power of Viceroy, and directed the following decree to Governor Romen:

"In conformity with the opinion of the Assessor of the *Comandancia General*, I have determined, in a decree of this date, that, notwithstanding the provisions made in the eighty-first article of the Ordinance of *intendentes*, the Captains of the Presidios are authorized to grant and distribute house-lots and lands, to the soldiers and citizens, who may solicit them, to fix their residence on. And, considering the extent of four common leagues, measured from the center of the Presido Square, viz., two leagues in every direction, to be sufficient for the new Pueblos, to be formed under the protection of said Presidios, I have * likewise determined, in order to avoid doubts [192] and disputes in future, that said Captains restrict themselves henceforward to the quantity of house-lots and land within the four leagues already mentioned, without exceeding in any manner said limits, leaving free and open the exclusive jurisdiction belonging to the *intendentes* of the Royal Hacienda respecting the sale, composition, and distribution of the remainder of the land in the respective districts.

"And that this order may be punctually observed and carried into effect, you will circulate it to the Captains and Comandantes of the presidios of your province, informing me of having done so.

"Chihuahua, March 22, 1791.

"PEDRO DE NERVA."

"To Señor Don Joseph Antonia Romen."

On the 27th of October, 1785, the Fiscal (Attorney-General) at Chihuahua, recommended that "The allotting of tracts of land (*sitios*) for cattle, which some settlers in California claim, and the Governor proposes in his official communication of the 20th of November, 1784, cannot nor ought not to be made to them within the boundaries assigned to such pueblo, which, in conformity with the law 6, tit. 5, liber 4 of the recopilacion, must be four leagues of land in a square or oblong body, according to the nature of the ground, because the petition of the new settlers would tend to make them private owners of the forests, water, timber, wood, and other advantages of the lands which may be assigned, granted, and distributed to them; and to deprive their neighbors of these benefits, it is seen at once that their claim is entirely contrary to the directions of the aforementioned laws, and the express provisions in article eight of the instructions for settlements (*poblaciones*) for the Californias, according to which all the waters, pastures, wood, and timber, within the limits which, in conformity to law, may be allotted to each pueblo, must be for common advantages, etc., that all the new settlers may enjoy and partake of them, maintaining thereon their cattle, and participating of the benefits that arise."

On the 21st of June, 1786, the Commandant-General transmitted this opinion to Governor Fages, and directed him to proceed to grant accordingly.

DOCUMENT IN THE UNITED STATES LAND OFFICE.

The regulations of Petic, made to apply to all towns subsequently established, ratified by a royal order of 1789, declare in Article 6th:

"The tract of four leagues granted to the new settlement, being measured and marked out, its pastures, woods, waters, privileges, hunting, fishery, stone-quarries, fruit-trees, [193] and other * privileges, shall be for the common benefit of the Spaniards and Indians residing therein, and in its suburb or village, as shall also be the pastures of the lands," etc.

It is also well known, that throughout Spanish America it was contemplated that, after the Indians had been under the care of the Church for several years, and instructed in religion and the arts of civilization, they should be emancipated, and the mission establishments converted into pueblos. In the instructions of the Viceroy, the local government in California, dated August 17, 1773, he says: "As the mission settlements are hereafter to become cities, care should be taken, in their foundation, that the houses should be built in line, with wide streets and good market-squares." The Viceroy proceeds to confer the power, and the local officers to carry out this plan. He declares: "With the desire that population may be more speedily assured in the new establishments, I, for the present, grant the commandante power to designate common lands, and also even to make individual

concessions to such Indians as may most dedicate themselves to agriculture and the raising of cattle; for, having property of their own, the love of it will cause them to plant themselves more firmly."

In the thirteenth article of these instructions, the Viceroy expressly requires the commandante to proceed according to the laws of the Indies, above quoted, as follows: "He must act, in every respect, in conformity with the provisions made in the collection of the laws respecting newly-acquired countries and towns (*reducciones y poblaciones*), granting them legal titles for the owner's protection, without exacting any remuneration for it, or for the act of possession."

The fifteenth article provides expressly that "the missions shall be converted into pueblos, with all the rights and privileges of other towns." Article fifteenth: "When it becomes expedient to change any mission into a pueblo, the commandante will proceed to reduce it to the civil and economical government, which, according to the laws, is observed in the other pueblos of this kingdom, giving it a name, and declaring, for its patron, the saint under whose auspices and honorable protection the mission was founded."

In the "regulations for the government of the province of California, by Don Felipe de Neve, Governor of the same, dated in the royal presidio of San Carlos de Monterey, June 1, 1779, and approved by His Majesty, in a royal order of the twenty-fourth October, 1781," which provide for the settlement of the country, the regulation of the missions and presidios, and the formation of pueblos, the fourth article declares: "The house-lots to be granted to the new settlers (*pobladores*) are to be designated by government in the situations and of the extent, corresponding to the locality on which the new pueblos are to be established, so that *a square and streets be formed agreeable [194] to the provisions of the laws of the kingdom, and conformable to the same; competent common lands (*exidos*) shall be designated for the pueblo and pasture-grounds, with the sowing-lands that may be necessary for municipal purposes (*propios*.)

The fifth article further provides: "And of the royal lands, (*realengas*), as many as may be considered necessary shall be separated for the *propios* of the pueblo, and the remainder of these, as well as of the house-lots, shall be granted in the name of His Majesty, by the Governor, to those who may hereafter come to colonize."

The eighteenth article directs the Governor for the first two years to appoint "ordinary alcaldes and other municipal officers," and "for the following ones, they shall appoint some one from amongst themselves, to the municipal offices, which may have been established, which directions are to be forwarded to the Governor for his approbation." (Rockwell, 445.)

The Mexican government always acted upon the idea that the missions were to be converted into pueblos, and Governor Fig-

ueros, issued an order to that effect, as to the missions in California in 1834. (Rockwell, 456.)

The Republic of Mexico, after the revolution of 1824, fully recognized the rights of the towns in their commons, pastures, and municipal lands.

The second article of the Colonization Law of 1824 enacts, "The objects of this law are those national lands, which are neither private property, nor belonging to any corporation or pueblo, and can therefore be colonized." The provision fully recognizes the fact that pueblos were the owners of land in property, which could not be the subject of grant.

It will thus be seen that under the laws of the Indies, whenever a pueblo was formed by a grant to a founder, or the union of ten or more families, or the foundation of a presidio, or the secularization of a mission, each pueblo was entitled in property to certain tracts of land within the limits of the town, to be set apart to them, called (*exidos*) commons, (*dehesas*) pasture-grounds, and (*propios*) municipal lands, and that they were so entitled by virtue of their organization as pueblos.

The presidio of San Francisco was founded in September, 1767. At that time each pueblo was entitled to the extent of four leagues as an exterior boundary. Subsequently, in 1791, as already shown, these limits were extended to two leagues in every direction from the centre as the limit of a presidio pueblo. In October, 1776, the Mission of Dolores was founded. It has already been shown that the secularization of each mission was contemplated from its foundation, and that it was to be [195] also converted *into a pueblo. This did not leave quite space enough to the presidio of San Francisco for a four-league pueblo. It is reasonable to believe that a line was early established between the presidio and the mission, and the same seems to have been substantially adopted by M. G. Vallejo, in 1834, when he established the line of the pueblo of San Francisco, as will be seen by reference to the pueblo documents on file in the United States Land Commission, and now deposited in the United States Surveyor-General's office.

The place called *punta Yerba Buena*, upon which the city of San Francisco now principally stands, has been given an undue importance in the controversy. It seems never to have been a pueblo, separately from the *presidio*. It is within the limits of the four leagues, pertaining to the pueblo of the presidio. Neither are the rights of that pueblo in any way affected by the fact that most of the population removed from the presidio post to the Yerba Buena after 1835. It was part of the same pueblo politically and in a jurisdictional point of view, being within its original limits.

The presidio always had a considerable population, from the date of its foundation until long after the Mexican revolution. In 1802, Humboldt reported the population to be nearly four hundred. (*Vide* Senate Doc., and Jones' Report.)

It is strongly urged, in the brief of the appellants, that pueb-

los had no right to sell or grant their common or municipal lands. It will appear from the foregoing quotations from the laws of the Indies, that they had a right to dispose of certain lands within the pueblo limits, to defray municipal expenses. The Spanish regulations devoted the property to that purpose.

It is also to be observed that the decrees of the Cortes of 1813, directs the pueblo lands, or at least a portion of them, to be granted and converted to private ownership.

The Departmental Assembly of California, by a decree of September, 1835, authorized the ayuntamiento of the pueblo of San Francisco to grant lots, not exceeding one hundred varas. It is to be observed that this decree is directed to the alcalde of San Francisco, not of the pueblo of Yerba Buena, and is an authority in the place of part of the pueblo of San Francisco, named Yerba Buena. It is a legislative declaration that the pueblo had *proprios*, (municipal lands,) and *arbitrios*.

This decree was a regulation of the affairs of a public corporation, as they may be regulated by legislation, both in England and in this country. The decree is as follows:

"The most Excellent, T. Dep., in Sessions the 22 September, approved that the Ayunt'o of the pueblo may grant lots, which do not exceed 100 varas, for the building of houses in the place *named Yerba Buena, at the distance of 200 varas [196] from the shore of the sea, paying to that Ayunt'o the fees which may be designated to him, as pertaining to the *proprios* and *arbitrios*, and being subject to observe the order for forming the town, in lines, in accordance with the ordinances regulating the police, which I communicate to you, that you may make it known to the inhabitants of that pueblo, in order that they may not apply with their memorials to this political government, as it is one of the favors which the Ay'to can grant.

"JOSE CASTRO.

"Monterey, Oct. 26, 1835.

"Directed to Señor Alcalde de San Francisco de Asis "

It is a mistake to say that the confirmation to the city of San Francisco, by the Land Commissioners, does not proceed on the ground of a grant. The whole legal effect of the act of Congress of 3d of March, 1851, was, as a matter of evidence, to create a presumption of grant to a town of all the vacant lands within its limits, as recognized or established on the 7th of July, 1846, to such towns as were settled previous to that time.

The act declares, that "the fact of the existence of the said city, town, or village, on the said 7th of July, 1846, being duly proved, shall be *prima facie* evidence of a grant to such corporation, or to the individual under whom the said lot-holders claim; and where any city, town, or village, shall be in existence at the time of passing this act, the claim for the land embraced within the limits of the same, may be made by the corporate authority of the said city, town or village."

The majority of the commission decided that the evidence of

a grant was sufficient, under the act, to authorize the presumption of one, according to the Vallejo line. The opinion concludes as follows: "These conclusions bring the case, in our opinion, clearly within the operation of the presumption raised in favor of a grant to the town by the fourteenth section of the Act of 3d of March, 1851, and entitle the petitioner to a confirmation to the land contained within the boundaries described in the document above mentioned."—[The Zamarano Document.]

Parties who contest a grant, by competent authority, within the city limits after this confirmation, which is now made final, the appeal having been dismissed by authority of the government, must rely on a sufficient title issued by competent authorities previous to the 7th of July, 1846.

If the proper officer has granted, within the acknowledged limits, his grant is *prima facie* valid, and conveying lands which he had a right to grant.

Whether the *proprios* of a pueblo could be sold or not, at forced sale, under the Mexican law, the act of Congress of 1851, creates a new tenure, and operates a confirmation in fee [197] to the city. *And especially after the adoption of the common law in 1850, the municipal and common lands of pasturage were liable to execution-sale.

It is urged that the city had no title to the property sold under the judgment, and that, therefore, the sheriff's deed is not sufficient to authorize a recovery in ejectment. If the confirmation of the United States Commissioners is to be regarded as of any value, it establishes the fact that the city had a title on the 7th of July, 1846. The decision is based entirely on that ground. But if it were otherwise, and the Act of Congress of 1851 is to be treated as a grant or release of the interest of the United States to the city of San Francisco, there was title in the city, either legal or equitable, at the date of the execution-sale. September, 1851, after the date of the Act of Congress, which was the 3d of March, of the same year. The property was sold by the sheriff, on the 30th of January, and 1st and 2d of February, 1852.

After the adoption of the common law, in 1850, it cannot admit of reasonable doubt that the town-lots of the city held for grant, could be seized and sold on execution to satisfy judgments against the city.

It must also be borne in mind, that in 1851, the Legislature expressly authorized the city authorities of San Francisco to alienate the lands and vacant lots belonging to the city.

It must be apparent that the Act of Congress of the 3d of March, 1851, would inure to the benefit of alcalde grants made by the proper authorities, subsequent to the 7th of July, 1856.

These grants were sales; and it is well settled in the civil law in force in California, until the adoption of the common law by the Legislature of 1850, that a subsequently acquired title will inure to the benefit of the prior vendees of the city.

"Although the sale of another's property be null, yet the subsequent acquisition of the title by the vendor vests it at once in the vendee, who cannot afterwards sue for a rescission of the sale." (2 Hen. La. Dig., p. 1380; 12 Mart. 187; Id. 649; 5 Mart. N. S. 247; 9 L. A. 99; 12 Id. 170; 5 La. An. 532.)

There does not seem to be any ground for doubting that the Pueblo of San Francisco had pueblo lands previous to the 7th July, 1846, which the ayuntamiento at one time, and the alcaldes at another, might grant. At the time of the change of government, the alcaldes had the power to grant fifty-vara lots within the pueblo. In respect of the municipal laws so granted, the alcalde acted as the officer of the corporation upon whom authority for that purpose had been conferred by the government and Departmental Assembly. It is a misnomer to call these titles American alcalde grants. They were the grants of the pueblo of its own property, which it had a right to transfer, by virtue of the municipal law, which was con- [198] tinued in force by the new sovereign, until 1850. As to all grants made by the alcaldes, it must be presumed that they were of municipal lands which these officers had a right to grant, until the contrary is shown.

It is urged that the fees of the ungranted lots within the city remained in the Mexican government, because the municipal and common lands were never actually assigned to the pueblo by a survey or judicial possession made by competent officers.

The practical force of this argument is not perceived. It is perhaps true that the Governors might grant within the pueblo, until the measurement was had; but under the Spanish and Mexican law, the right of the pueblo to have the municipal and common lands assigned, was an acknowledged equity. The United States succeeded to the fee charged with this equity, and are bound to respect it by the treaty with Mexico.

The Act of Congress of 1851, removes all difficulty about the boundary, by acknowledging this right; and by releasing to the present city all lands vacant and ungranted on the 7th of July, 1846, removed all difficulties on the subject. Under the decisions of the Supreme Court of the United States, this release was equivalent to a legislative grant, upon which ejectment can be maintained, as well as upon the patent, which is only a ministerial act, while the other is the direct act of the sovereign, through the legislative department. See *Grignon et al. v. Astor et al.*, 2 Howard, 319, in which the Supreme Court of the United States held, that "a title to land becomes a legal title when a claim is confirmed by Congress. Such confirmation is a higher evidence of title than a patent, because it is a direct grant of the fee, which had previously been in the United States."

I have thus attempted to show the right of the pueblo of San Francisco to municipal lands, and that, whether the fee of the same, under either Spanish or Mexican *regime*, remained in the supreme government or passed to the pueblo, the Act of Con-

gress of 1851 operated a conveyance of such lands to the city of San Francisco. I have attempted to demonstrate that grants made after 1846, by American alcaldes, as they are called by the learned counsel, were not void; that the municipal laws remained in force during the occupation of the country by American troops, and that the act of disposing of the private property of a municipal corporation was not political.

It is contended, however, that the decision in *Woodworth v. Fulton* was sustained by this Court, in the subsequent cases of *Clarkson and Vanderslyce v. Hanks*, 3 Cal. 47, and *Leese and Vallejo v. Clark*, 3 Cal. 17. In the first case the question under discussion was neither raised nor argued. In the second, the right of the pueblo to lands within her territorial limits was not relied on, but the case went off on the point that, conceding the power of the Governor to grant within the pueblo limits, [199] the grant in question *only conveyed an inchoate title, which was insufficient to sustain an action of ejectment.

But the fact is directly the contrary. In spite of this decision, men maintained their rights by force of arms; and alcalde grants, whether made before or after the occupation of the country by Americans, were regarded as good titles to the land they purported to convey.

As a specimen of the reasoning upon the opinion of *Cohas v. Raisin*, it is only necessary to transcribe the following passage from the appellant's brief:

"The opinion commences," says the learned counsel, "with the following quotation from the Spanish law, 'Our will and pleasure is, that cities, towns, and villages shall retain their rights and revenues, and municipal lands, (*proprios*,) and that no grants be made of them, and we command that all grants of the same, or any part thereof; which we make to any person, be of no value whatever.'

"I would, in all seriousness, ask, what support for the doctrine sought to be sustained, can be derived from this law? In order to be of any avail to the opinion, the reasoning must be this: It is the will and pleasure of the King, that cities, towns, and villages shall retain their rights, revenues, and municipal lands, therefore they have a right to part with them; but, says the King, it is our will and pleasure that no grants be made of such lands, therefore a grant of such lands by an American alcalde is good. Again, says the King, we command that all grants of the same, or any part thereof, which we may make to any person, be of no value whatever—consequently, says the opinion, because grants by the King are void, grants by an American alcalde are valid. I might proceed with the rest of the paragraph, in the same way, showing an unmeaning citation of authorities, upon points which were never doubted or disputed, or false deductions from such authorities, if they can be considered as having any applicability at all."

Now, on examination of the decision of *Cohas v. Raisin*, 3 Cal. 443, it will be observed that this quotation was only intro-

duced for the purpose of showing that towns and cities might own municipal lands, and that their right to the same was so completely vested; that even the sovereign could not dispose of them; and the inference from this, if any is to be drawn, is that the prime right of disposition of such property was in the municipal authorities, and not in the sovereign power of the State.

The main difficulty of the counsel seems to rest upon the supposed fact that American alcaldes could not grant the lands of the pueblo. This case does not involve the question; the plaintiff does not claim by virtue of an alcalde grant, but through a judicial sale, made after the passage of the Act of Congress. *Were it otherwise, we have attempted to demon- [200]strate that these grants are valid.

This new-born zeal to defend the old Californians against the usurpations of their American conquerors, is commendable, in the highest degree; but, like most after-thoughts, it comes too late. Disguise it as you will, when stripped and exposed, it is only a ruse to take from the early immigrant the products and acquisitions of his labor, for the benefit of those who came to the State at a more recent period, or to compel the industrious and fortunate to share with the idle and improvident. In fact, it goes beyond this, to the extent of holding that those who came here before the year 1849, and particularly the original inhabitants, are disqualified from holding land altogether.

In speaking of the case of *Woodworth v. Fullon*, and *Cohas v. Raisin*, the counsel remarks, that: "The former case, it is true, encountered, at first, a violent, bitter, and unscrupulous hostility; but that has passed away, and 'the sober, second thought of the people' has reversed the respective positions which *Woodworth v. Fullon*, and *Cohas v. Raisin*, at first occupied."

I, at least, have seen no symptoms of a change from the day that that opinion was announced, and if I were in the habit of being governed by popular clamor, instead of what I believe to be principles of law, I would cheerfully abide the voice of the people on this question, so fully am I satisfied that there is a sufficient sense of justice and honesty in the masses to repudiate so gross an outrage upon private rights, as would be the case if *Woodworth v. Fullon* should be again declared the law of the land. That opinion created consternation and alarm; it unsettled the laws of property, despoiled men of their possessions, and introduced into a peaceful community disgraceful scenes of riot and bloodshed, calling down upon its authors the anathemas of the whole people. The decision of *Cohas v. Raisin* was an olive branch of peace; it restored confidence in landed property, gave security to business operations, and quieted the angry passions of those who imagined, not without cause, that they had been improperly stripped of their property.

The question now remains to be determined, whether, admitting the case of *Woodworth v. Fullon* was law, this Court should adopt it, and abandon the case of *Cohas v. Raisin*.

As has been previously remarked, Courts are not justified in

overruling their former decisions, and unsettling established principles, simply because error may have intervened. A wise and prudent Judge will always examine the consequences which must result from the change, and the effect it will have upon the community, and unless the inconveniences arising from the error greatly outweigh the advantages which would result from an adherence to the rule, the decision will be permitted to stand.

[201] *I have stated what is a part of the history of this State, that the decision of *Woodworth v. Fullon* was never acquiesced in either by the bar or the public; that it was subsequently overruled, and that, since that time, the case of *Cohas v. Raisin* has often been affirmed by this Court. (See *Leonard v. Darlington*, 6 Cal. 123, and *Dewey v. Lambier*, 7 Cal. 347.) The whole community has acted upon the faith of the decisions, and it has probably never entered the brain of any sane man, except, perhaps, that of the appellant, that the rule thus firmly established would be overturned.

The practical consequences of such a change would be, conceding the appellant's position, that no title has passed out of the city since its occupation by American troops, and that every title made since that time is void. That when the city acquires the title to said lands, she may dispose of them for her own benefit, leaving those who have bought and improved in good faith without remedy. It goes further; if the city has any title by virtue of the act of Congress, and can by her charter make a voluntary disposition of her lands, then all such lands are relinquished by virtue of the so-called "Van Ness ordinance," to those in actual possession, without regard to rights of third parties.

The consequences of such a rule would be to destroy every title in the city, with the exception of the few that were made anterior to 1846, and to drive the present owners to seek relief from the city authorities. And for whose benefit, let it be asked, is this Court requested to perpetuate so foul a wrong? For the benefit of those, for the most part, who set up no right to the land, except so far as may be derived through the divine right of squatting, or appropriating their neighbor's property!

A brief reference to the history of the country, will serve to explain the pretended equities of those who are so loud in their denunciations of the decision in *Cohas v. Raisin*. In 1848-'49, the immigration which was drawn to California was composed, principally, of those who were anxious to better their fortunes by labor in the mines. Land was of little or no value, and passed, by the mere delivery of possession. Soon, the wants and necessities of trade began to require fixed places of business. San Francisco, at that time the commercial metropolis of the State, was supposed to be the owner of certain municipal lands. This was the opinion of its oldest inhabitants. The right to dispose of these lands was supposed to be vested in its municipal officers. This right was conceded and recognized by common

consent. Access to the laws regulating the subject, was at that time impossible, but relying upon the traditions of its oldest inhabitants, the people elected officers, who undertook to dispose of the public property, for the common benefit. The land was laid out into lots, which were disposed of at public and private sale. These sales were confirmed by the old municipal govern-*ment, and their validity has never been ques- [202] tioned by the city of San Francisco since it was incorporated by the Legislature. On the other hand, for a period of nearly seven years, she has not only slept on her rights, but by various acts has indirectly recognized those sales, and though it may be admitted that a portion of the proceeds was improvidently squandered, yet by far the greatest part went into the general fund, and was spent in maintaining hospitals, police, the improvements of streets, and for various other municipal purposes. Under this system, the people of San Francisco ministered to the wants of the sick and needy immigrant, who was cast upon their shores; they maintained the law, preserved peace, protected life and property, and laid the substantial foundations of a great city, which is yet destined to rival the marts of the old world. Are those who thus purchased in good faith, and for a valuable consideration, to be denied their property, because some one with full knowledge of all the facts may choose to settle upon it, and deny the authority of an American alcalde to grant the same?

The city of Sacramento is another fit illustration of this doctrine. Sutter's grant was known both in the United States and Europe before the discovery of gold. The immigration of 1849 found him in the possession of the land on which the city of Sacramento now stands, claiming the same by title from the Mexican government. Notwithstanding this, they suddenly ascertain that the Mexican government had no right to grant so large a tract of land, and if it had, that New Helvetia is not within its limits, and, therefore, they set themselves to work to dispossess him, and claim to be *bona fide* settlers on the public lands. If Sutter or his grantees should recover, after years of litigation, they claim the value of the improvements which they pretend to have put upon the land without notice, when the knowledge of his claim was a part of the history of the country.

Those who have settled in good faith upon lands, believing them to belong to the United States, without notice of an adverse title, ought to be protected; in fact, are protected by the rules of law and equity. Such men are entitled to the sympathy of the community, and the consideration of the Courts. But those who, knowing a party's title and possession, attempt to determine its validity for themselves, and enter without regard to another's right, are entitled to no consideration whatever. It is a misnomer to call them settlers.

Judgment affirmed.

TERRY, J.—I concur in the judgment of affirmance in this

case, for the reason that the principles involved in the case of *Cohas v. Raisin*, have been the rule of decision in this State for four years: that large investments have been made, and valuable interests acquired upon the faith of that decision, and [203] the * effect of overruling it at this time would be to unsettle the title to a large portion of the most valuable real property in the State, and thus open the door to endless disputes and litigation. I think, therefore, that the opinion in that case should be regarded as a final settlement of the questions passed upon.

It is urged by appellant that the same reasons existed for applying the rule of *stare decisis* to the case of *Woodworth v. Fulton*, which was overruled by *Cohas v. Raisin*, and that inasmuch as this Court has, in that and some other instances, departed from the rule, we should now proceed to determine the questions raised by the record in this case, as though they were presented for the first time.

To this proposition I cannot assent. I think in all cases of this nature, involving questions affecting the title to real estate, it is better that a uniform rule of decision should be established and adhered to; that the law of property should not be made to vary so as to conform to the individual opinions of each succeeding Judge or Court, nor the tenure of lands to depend upon the result of popular elections. Whatever views I may entertain as to the correctness of the conflicting opinions in *Woodworth v. Fulton*, and *Cohas v. Raisin*, considerations of public policy and justice, as well as regard for individual rights acquired under the law as announced by the highest judicial tribunal, imperatively demand of us a strict adherence to the doctrines of the latter case.

BURNETT, J.—I concur in affirming the judgment of the Court below on two grounds: First, That the title to the property in question, vested in the city of San Francisco by virtue of the act of Congress. Second, That the title of the city passed to the purchaser under the sheriff's sale.

Neither of these grounds are discussed by the learned counsel of defendant. And as to the questions decided in the two cases of *Woodworth v. Fulton*, and *Cohas v. Raisin*, they are not necessarily involved in this case, and I express no opinion in respect to them.

OCTOBER TERM, 1857.

195

REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT,

OCTOBER TERM, 1857.

SELIGMAN ET AL. v. KALKMAN ET AL.

¹ FRAUD, OF PURCHASER VITIATES SALE.—Where a person, clearly insolvent, purchases goods from another on credit, and conceals the fact of his insolvency from the vendor, he is guilty of such fraud as vitiates the sale.

IDEM.—REMEDIES.—A party wishing to avoid such sale, on the ground of fraud, has no right to sue upon the contract at the same time. The latter suit may be pleaded in bar to the former.

APPEAL from the Superior Court of the City of San Francisco.

The facts of this case are sufficiently stated in the opinion of the Court, with the exception of the third instruction given to the jury, under the exception of plaintiff's counsel, which was as follows:

“The circumstance of Kalkman & Co.'s insolvency, even if they knew their situation at the time of the purchases, would not, of itself, show that the purchases were fraudulent; for a party doing a large business, although the balance is against him, may honestly believe he can, in the course of trade, overcome his embarrassment; and while revealing his pecuniary situation would certainly be ruinous, his silence in regard to it, may, possibly, be as consistent with honesty, as it is always with prudence. This fact of insolvency, therefore, without other facts and circumstances, tending to show an intention, at the time these goods were bought, not to pay for them, is not necessarily a fraud.”

1. Overruled, *Bell v. Ellis*, 33 Cal. 626; *Kloppenstein v. Mulcahy*, 4 Neb. 300.

[208] *Judgment for defendants. Plaintiffs moved for a new trial, which being denied, they appealed.

Williams, Shafter & Park, for Appellants.

That wherever a merchant, or other person, insolvent, and knowing, or having every means of knowing himself to be so, purchases goods upon credit, without any reasonable expectation that he will be able to pay for them, he is guilty of such fraud against his vendor as invalidates the sale to him.

In the *Earl of Bristol v. Wilmore et al.*, 8 Eng. C. Law, 146- the Court say: "If the vendee (Miller) contracted for and obtained possession of the property (sheep) in question, with a preconceived design of not paying for them, that would be such a fraud as would vitiate the sale, and, according to the cases cited, would prevent the property from passing to him." (6 T. R., 565; 3 Camp. 352, 370; 2 Rus. on crimes, 1,392; 7 Taun. 59.)

The only evidence of fraud in the principle case was, the vendee making payment by a check upon his bankers, with assurance that it "was as good as money," when his account had been overdrawn for some months, and having confessed a judgment on the day of purchase, to another upon execution issuing upon which the property was seized.

In *Ferguson et al. v. Carrington*, 17 E. C. L., 330, "Lord TENDERDEN, C. J., was of opinion, that if the defendant had obtained the goods, with a preconceived design of not paying for them, no property passed to him by the contract of sale." "The evidence of this intent was, that the goods had been bought upon *credit*, and that immediately after receiving the goods, the defendant sold them at reduced prices to other persons," and this evidence seems by the Court to have been considered sufficient.

Irving et al. v. Motley et al., 20 E. C. L., 233, TINDAL, C. J., puts the principle fully, that an intention not to pay for goods purchased at the time of purchase, renders the sale fraudulent, and, in connection therewith, states what evidence is competent to establish such intention.

"Forced sales, at a considerable discount, to raise money for the wants and embarrassments of the vendees, and that such sales were such as 'none but persons in embarrassment would have consented to.' The existence of pressing embarrassments, and the bills they had to renew, it is not too much to say, they went to market with the certainty, or *great probability*, that the goods purchased (wools) would never be paid for. Evidence of other similar transactions is declared to be proper to show this *intent*, and the doctrine that the transaction must amount to the crime of procuring goods under false pretenses is denied."

De Wolf v. Babbett, 4 Mas. 289, STORY, J., it was held, that if delivery of goods sold was procured by a fraudulent suppression of the vendee's failure, "the delivery was altogether

[209] *without any legal validity, and that the vendor had a right to reclaim."

Lupin v. Mane, 2 Paige, 169, Chancellor WALWORTH holds: "If a merchant in good credit, knowing himself insolvent, and concealing that fact from his vendor, makes the purchase of goods, intending then never to pay for them, or for the purpose of placing them in the hands of an assignee, for the benefit of other creditors, there can be no doubt it would be such a fraud as would vitiate the sale."

Fleming v. Slocum, 18 Johns. 403, the Court holds, that at law, a *suppressio veri*, in a fact material to the contract, invalidates a sale.

Fitzsimmons v. Jostin, 21 Vt., the Court go over the whole law upon this subject, and hold the whole race of vendees to the rule of common honor and honesty, and upon authority fully denying all distinction between *suggestio falsi* and *suppressio veri*, hold, that the pecuniary solvency of a vendee, is an essential element of the contract of sale, and that when "one is wholly and notoriously desperate in regard to pecuniary responsibility, it cannot be said he can be legally justified in suffering himself to pass for a man of substance, although he himself had been in no way instrumental in bringing about the delusion."

The third charge conflicts with the authorities above cited. It declares, if a vendor knows himself to be insolvent when he makes purchases, this does not authorize the jury to find the purchase fraudulent.

The jury are not told, that from these facts they would be authorized to find that the purchaser did not intend to pay, however hopeless his insolvency might be, for he might expect to retrieve his fortunes. Is not this hope of retrieving, and the circumstances upon which it is based, a matter within his peculiar knowledge, and for him to prove as an explanation, or rebutting of the plain and natural inferences resulting in supposing that he did not intend to pay, when he knew he could not pay.

Suppose the attachment suit was for the same property; then it is insisted, that such suit cannot affect the question of title to the property; that there can be no implied ratification of a fraud by the party injured. The beneficence of the law would be prompt in rejecting such a proposition. Remedial rules of law are always liberally construed; so, different remedial proceedings will be regarded only as cumulative in favor of the right. That which is most potent and persuasive will be allowed the fruits of success, and cannot be injuriously affected by any other unavailing attempt to reach the same result. If it were otherwise, then the greater the diligence the greater would be the danger. If there was fraud in the purchase, then there was no sale, and the plaintiff, suing as upon a sale, cannot make valid what was void.

*Besides, the law, which is the representative of reason, will, in such case, assign, as the cause of the attachment suit, the ignorance of the plaintiffs as to the fraud, when

that suit was commenced. This is urged, upon the hypothesis, that this Court will assume the two actions to be for the same cause.

Sydney V. Smith, for Respondents.

Respondents fully admit that if a man purchase goods with the preconceived idea not to pay for them, it is a fraud upon the seller, and that the latter has a right to rescind the sale and re-take his goods.

But this question of a preconceived idea, or in other words, of the intended fraud, is one solely for the jury. It is for them to say whether the facts, as proved in the case, tend to show that a fraud was committed or intended. It is not within the province of the Court to tell the jury, in so many words, as is claimed by the appellants. "If you find that such and such facts are true, then the Court charges you that those facts constitute a fraud," because whether the facts constitute a fraud is the very question for the jury. In a case of legal fraud, such a charge might be correct, but it never can be so in the case where an actual fraud is claimed, and the sole ground upon which the appellants have sought to recover in the Court below, was that an actual, not a legal fraud had been perpetrated on them.

Mere insolvency alone is no ground for rescinding a sale, not even if the purchaser "knew of it." He never is under the necessity of revealing the condition of his affairs to the seller. This was expressly decided in *Mitchell v. Worden*, 20 Bar. 253. In that case, it was sought to rescind the sale on the ground that the purchaser had by fraud procured the delivery of the articles sold, such fraud being formed in the fact that the purchaser was insolvent when he purchased, and did not reveal the fact to the seller. The Court says: "Assuming the fact to be that McCabe was, at the time of the purchase of the brandy, insolvent; that his circumstances had become reduced during the period he was buying of the plaintiffs from time to time on credit; and meeting his engagements as to payments, and that he well knew his insolvency and intentionally concealed it from the plaintiffs, by simply withholding his knowledge on the subject without otherwise saying or doing anything to mislead, yet retained the possession of property, and was pursuing his business as theretofore; he was not, in my opinion, guilty of fraud, entitling the plaintiffs to avoid the sale. The law does not, in ordinary cases, impose upon a purchaser of property, the duty to disclose to the seller, at or before the sale, the state of his pecuniary circumstances, however desperate they may be, or be known by him to be." "The general principle, above stated,

that the purchaser is under no obligation to disclose to
[211] *the seller his insolvency, although known to him, is, I think, equally applicable, notwithstanding there has been a long course of dealing between the parties, in the course of which credit has been given to the purchaser, and he has punc-

tually performed his engagements, his insolvency having accrued during those dealings. No relation of trust or confidence is thereby created which should entitle the seller to expect of the purchaser, or require of him as a legal duty, to communicate to the seller information of his ability to pay all his debts, while he continues his business and the management of his affairs."

In *Henshaw v. Bryant*, 4 Scam. 97, the Court, on page 108, declaring the law, as it is admitted by respondents, that intention not to pay for goods would avoid the sale, yet also states the law to be: "That while a man is really struggling against adversity, with an honest intent to retrieve his fortunes, the law will not declare him incapable of purchasing goods on a credit, although he does not disclose to his vendor the extent of his embarrassments. In such a case, there is wanting that essential ingredient in fraud, a design not to pay."

In *Cross v. Peters*, 1 Greenl. 376, the same doctrine was declared: "That the mere insolvency of the vendee, and the liability of the goods to immediate attachment by his creditors, though well known to himself, and not revealed to the vendor, will not be sufficient to avoid the sale."

There is not, in the case at bar, any—the slightest—evidence that any fraud or misrepresentation was really practiced on appellants themselves; and even admitting that Kalkman & Co. did commit frauds on others, subsequent to the purchase from appellants, the jury, by their verdict, have found that Kalkman & Co. never intended fraud against appellants, and, as a consequence from that, that when they bought the goods from appellants, that they did really intend to pay for them.

The question then arises, was there any error in the charge of the judge.

He told them distinctly that if they should believe that Kalkman & Co. bought the goods, intending never to pay for them, they should find for appellants. He left to them all the facts of the case; told them that the evidence to prove the fraud need not be positive, that it might be inferred from circumstances, and while telling them that the acts of Kalkman & Co. towards other persons, after the 11th of March, 1856, tending to show fraud as against such persons, should be received and considered with great caution, yet expressly told them, that if they could trace back those acts, and should believe that they tended to explain the intent with which Kalkman & Co. purchased the goods from Seligman, then such acts were applicable. That is, in other words, the Court told the jury that if they could find that A. had robbed B., it did not necessarily follow [212] therefrom that A. had robbed C.; in making up their minds, however, as to whether A. had robbed C., they might take into consideration the fact that A. had robbed B.

In reference to the authorities cited by appellants, respondents assert that they are not correctly stated.

The *Earl of Bristol v. Willsmore*, was a motion for a new trial, which was granted on the ground that the preconceived design

not to pay, was one for a jury, whereas the Court at *nisi prius* had itself decided it.

In the next case cited by appellants, (6 Tenn. Reports, 565,) the vendee obtained the goods by a check on his bankers, with assurances that it was good, whereas his account had been overdrawn for months. The case, therefore, is not a parallel one with this, as there was not only a false representation, but a false token, and the goods were purchased on the faith of both.

The case of *Ferguson v. Carrington*, also cited by appellants, was *assumpsit* for the value of goods sold, not trover or replevin, so that while the remarks of TENTERDEN were law, they were not called for by the case at all.

Irving v. Molley, cited by appellants, is not correctly given by appellants. TINDAL, C. J., does not point out what is sufficient evidence of intention not to pay, but merely states the evidence in that particular case, and then proceeds to say that whether, under the facts developed, "the purchasers went to market with the certainty that the wools would never be paid for, was left to the jury," who had found the fraud, and the remarks of TINDAL were on motion for a new trial.

Fitzsimmons v. Johnson, 21 Vt. 129, is not at all in point. It was the case of a sale of goods to an irresponsible person, on the fraudulent representations of a third person, which were known by purchaser, at the time, to be false. In trover, for the goods, it was held that the purchaser was bound by the fraudulent representations of the person recommending him. In other words, that he was a party to an express fraud, which avoided the sale.

That it made no difference whether the false representation was made by the purchaser himself or by a third person, with his knowledge. The question, in either case, was, whether the goods were sold and delivered on the faith of the fraudulent representation.

BURNETT, J., delivered the opinion of the Court—TERRY, J., concurring.

The defendants, Kalkman and Meyer, were merchants, doing business in San Francisco and Sacramento City, under the firm name of P. Kalkman & Co. They had been previously in the habit of purchasing goods on credit from the plaintiffs. Between the 1st of January and the 12th of March, 1856, [213] defendants *purchased several parcels of goods, on time, amounting in all to about the sum of eleven thousand dollars. On the 14th of April, 1856, the defendant, Meyer, commenced a suit against Kalkman for a dissolution of partnership, upon the ground of gross misconduct on the part of Kalkman; and the defendant, Bell, was appointed by the Court, with the consent of the parties, as receiver. On the same day plaintiff sued out an attachment against Kalkman & Co. Afterwards, certain facts coming to the knowledge of plaintiffs, which induced them to believe that defendants, Kalkman & Co., had

procured the goods under such circumstances of fraud as to avoid the contract, they brought this suit on the 25th of April, 1856, to recover the possession of the goods. At the trial of this action, the attachment suit had not been discontinued. A judgment was had in the Court below for the defendants in the replevin suit, and the plaintiffs appealed.

It is fully established by most of the cases, and conceded by the counsel of defendants, that where a purchase of goods is made with the preconceived design of not paying for them, it is such a fraud as will vitiate the sale. (8 Eng. C. L. 156; 17 Id. 59; 4 Mas. 289; 1 Hill, 302, 317; 2 Paige, 169; 20 Barb. 253.)

If the design exists to defraud the vendor at the time the purchase is made, no title passes to the purchaser. The only difficulty in reference to cases of this kind, is to lay down some rule as to what facts shall constitute conclusive evidence of such intention. The intention of a party, which is the internal and invisible resolution of the mind, can only be known to others by external acts. It requires evidence to establish the existence of this intention. In estimating the force and effect of certain facts as evidence of intention, a man must be presumed to intend that which is the natural and ordinary result of his own deliberate act. (1 Starkie, 30; *Hall v. Curson*, 17 Eng. C. L. 290.)

In the case of *Cross v. Peters*, (1 Greenl. 376) it was held, that to render a sale of goods void, on account of the fraud of the purchaser, it must be shown that description and false representations, were fraudulently made by him to induce the vendor to part with the goods. In the opinion, nothing is expressly said about the effect of an intention not to pay for the goods, in a case where no deception and false representations are made. But, from the report of the case, the opinion seems to be too broad, and to be in conflict with the general current of English and American authorities. When the fraudulent intention exists at the time the purchase is made, there would seem to be no doubt as to the contract being void, as against the vendor, whether there was any misrepresentation or not.

In one of the head notes to this case, it is stated, that "the mere insolvency of the vendee, and the liability of the goods to * immediate attachment by his creditors, though [214] well known to himself, and not revealed to the vendor, will not be sufficient to avoid the sale." It is true, this doctrine is found in the opinion of the Court, but it is also true, that it is *obiter dictum*. The question really before the Court, as stated in the opinion of the Chief Justice, was, whether, "if a man doing business as a trader, and in good credit, (though insolvent at the time, but not aware of the fact,) obtains goods on credit in the town where he lives and is known, without practicing any artifice, or making any false representations or pretences, or, in fact, any representations or pretences at all," he is guilty of fraud. The Court held, that he was not.

In the case of *Mitchell v. Worden*, 20 Barb. 253, J. R. STRONG, J., expressed the opinion that "though the purchaser was in-

solvent at the time of the purchase, and well knew his insolvency, and intentionally concealed it from the vendor, by simply withholding his knowledge on the subject, without otherwise saying or doing anything to mislead, yet retained the possession of property, and was pursuing his business as theretofore, he was not thereby guilty of fraud, entitling the vendor to avoid the sale." But it appears that this was mere *obiter*; for the learned Judge says himself, "that it does not appear that the purchaser was then insolvent, or that he understood he was so, except as it may be inferred from the mere fact that he soon after made a general assignment for the benefit of his creditors, without any proof of the extent of his inability to pay his debts."

It was expressly decided in reference to the purchase of another portion of the property in dispute, that if the purchaser was not only insolvent, and knew the fact, but had performed an open and notorious act of insolvency, it was his duty, arising out of his previous dealing with the vendors, to disclose the fact before the sale, and that a violation of that duty amounted to a fraud.

The case of *Fitzsimmons v. Joslin*, 21 Vt. 130, was very fully considered. The able opinion of the Court, delivered by Mr. Justice REDFIELD, is admirable for its high and elevated moral tone. In that opinion, the learned Judge says: "If one is wholly and notoriously desperate in regard to pecuniary responsibility, it would not be said that he would be legally justified in suffering himself to pass for a man of substance, although he himself had been in no way instrumental in bringing about the delusion, if such a case could be supposed, or likely soon, to occur."

In that case, the purchaser was not only silent as to his insolvency, but others had represented him as doing a thriving business, and as worthy of credit; and the opinion of the Court, as I understand it, was predicated upon both grounds. The purchaser was held responsible for the concealment, on his part, and the positive misrepresentation, on the part of others.

[215] *In the case of *Bruce v. Ruler*, 17 Eng. C. L. R. 700, it was held that where A, at the request of B, his yearly tenant, accepted C as tenant instead, who proved to be insolvent, and it appeared that B, when he proposed C to A, knew that C had compounded with his creditors, but did not communicate that fact to A, the suppression of such fact was a fraud in B, which rendered him still liable to A for the rent."

The distinction attempted to be taken between the case of a purchaser who had previously committed an open and notorious act of insolvency, and who had not performed such an act, but was in truth and in fact as insolvent as the former, does not seem to be well founded. These cases differ more in mere appearance, than in point of reality. In the first case the insolvency of the purchaser is known to others, as well as to himself, while in the latter case it is known only to himself. But the vendor is in no better condition in one case than in the other,

and the purchaser should be held to be as honest in the first case as in the second. The question with the vendor is, whether the purchaser is then actually solvent or insolvent. The facts being within the personal knowledge of the purchaser, in the one as well as in the other case, he ought to be held to make them known in both. The vendor has the right to know the real state of the case, and not the mere deceptive appearances.

It may be difficult to arrive at any conclusion reconcilable with all the authorities; but, from the nature of the case, this rule would seem to be the most just and reasonable, namely: that where a person, clearly insolvent, purchases goods from another, on credit, and conceals the fact of insolvency from the vendor, he is guilty of such fraud as vitiates the sale.

The insolvency ought to be clear, and not subject to any reasonable doubt. And the purchaser must be held to know the true state of his own business; and, if he does not, the consequences should not be visited upon the party who had not the means of knowing. (*Alvarez v. Braman*, 7 Cal. 508; *Tuaffe v. Josephson*, 7 Cal. 352.)

In the second instruction given by the Court to the jury, they were told, substantially, that fraud is not to be presumed; that the presumption of innocence must be overcome by proof; that this proof may be circumstantial, if "the circumstances, when taken together, resist any other conclusion, and point with moral certainty to a fraud."

This instruction is objected to by the learned counsel for plaintiffs, as laying down too severe a rule, as to the effect of testimony required in a *civil suit*. This objection would seem to be well founded. The correct rule is laid down by Greenleaf on Evidence, Sec. 13 d. "In civil cases, it is sufficient if the evidence, on the whole, agrees with and supports the hypothesis which it is adduced to prove; but, in criminal [216] cases, it must exclude every other hypothesis but that of the guilt of the party."

The third instruction is erroneous, if the rule we have laid down be correct.

The fourth instruction is objected to, upon the ground that it charges the jury as to the weight they should give certain circumstances proved. The substance of the charge is that these circumstances should be received and considered with great caution, and that the Court was in doubt as to whether the testimony was admissible at all.

The seventeenth section of the sixth article of the constitution provides, that "Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." The right to "state the testimony" would hardly authorize a Judge to express his opinion as to its effect. He might well state that it was admitted for a specified term *only*, and not as competent evidence with respect to other issues. "Questions respecting the competency and admissibility of evidence, are entirely distinct from those which respects its sufficiency or

effect, the former being exclusively within the province of the Court—the latter belonging exclusively to the jury.” (1 Greenleaf Ev. Sec. 2.) We think the objection to this instruction well taken.

The fifth instruction was that “this controversy, in its effects, is not between plaintiffs and Kalkman & Co., but between these plaintiffs and all other creditors of the defendants, affecting as it does the dividends to all the creditors.”

This instruction, it would seem, was not required; but we are not prepared to say that the plaintiffs were injured by it. The charge contained nothing but the truth, and this was evident from the testimony that the jury would have known it without being informed by the Court. The charge might well have been omitted; but we think could produce no injury to plaintiffs.

In the seventh instruction, the Court charged the jury, among other things, that “if they believe, from the evidence, that since the plaintiffs became acquainted with the facts they still adhere to the suit upon the contract, and intend to prosecute it to judgment for the same goods, then they have no right to this suit, and you will find for the defendants.”

It is a very just general rule, that a defendant shall not be harassed with several suits for the same matter, at the same time. In such case, the pendency of one suit may be plead in abatement of the other.

In this case, the facts constituting evidence of the alleged fraud were unknown to the plaintiffs at the time the attachment suit was commenced, and when they afterward became known, by information obtained from third persons, they brought this suit.

[217] *But when they discovered the fraud, the plaintiffs should have promptly made election and relied only upon one remedy. It often happens that a party has his election to pursue one of two or more remedies; but he should not pursue several at one and the same time. To allow the plaintiffs to do so in this case, would have given them a great advantage over other creditors. By keeping both suits pending at the same time, and for the same matter substantially, and by prosecuting this one to judgment first, and failing in it, then to fall back upon the attachment suit, the plaintiffs would have had two chances to one over other creditors. We think the instruction correct.

Under the view we have taken, it is not necessary to decide the question whether the Court below erred in rejecting testimony in regard to the commercial sense of the word “inventory.”

For the foregoing reasons, the judgment of the Court below is reversed, a new trial ordered, and the case remanded for further proceedings.

POTTER v. SEALE.

¹ **MALICIOUS PROSECUTION, PROTECTION FROM CIVIL LIABILITY.**—Public policy and security require that prosecutors should be protected by the law for the civil liabilities, except in those cases where the two elements of malice in the prosecutor, and want of probable cause for the prosecution, both occur.

IDEM.—WHEN ACTION FAILS.—Though malice be proved, yet if there was probable causes, the action must fail.

IDEM.—PROBABLE CAUSE DEFINED.—The question of malice is one for the jury to decide. Probable cause is a mixed question of law and fact. The latter may be defined as a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true.

² **IDEM.—DEFENSE IN ACTION.**—Where the defendant has fully and fairly laid his case before counsel, and acts by advice thereof, it is a good defense to the action, though, the question whether the defendant acted *bona fide* under such advice, is a question of intention to be determined by the jury.

APPEAL from the District Court of the Fourth Judicial District.

The facts of this case are fully stated in the opinion of the Court.

McDougall & Sharp, for Appellant.

This action was instituted in the Fourth Judicial District Court by Potter against Seale, for malicious prosecution.

The complaint charges a malicious arrest, in the absence of probable cause, before the recorder of San Francisco. The affidavit, upon which warrant issued, is set out in complaint, and sets up certain facts in detail and specifically. The complaint further shows the discharge of plaintiff, and avers malice, but does not deny the truth of the charge made.

*The answer denies the allegations generally; sets up [218] that the matters complained of were true; denies all malice, etc.

Under the instructions and ruling of the Court, verdict was rendered, and judgment entered for plaintiff for three thousand three hundred and ninety-four dollars.

The defendant moved for a new trial, which was refused.

The facts are preserved by the case on new trial, and clearly shows that the facts in defendant's complaint before the recorder were true, and that the defendant acted under advice of counsel.

The defendant below, and appellant here, insists that there was a total want of cause of action, and if there was any pretext of cause, the verdict was outrageous.

The cause was before this Court at a previous term, and the errors then assigned were the refusal of the Court below to grant a new trial.

The Court was then of the opinion that there was no foundation for the verdict, and reversed the judgment.

1. Cited *Grant v. Moore*, 20 Cal. 648.
2. Cited *Levy v. Brannan*, 39 Cal. 488.

On the former trial, there was no proof of the fact that Seale acted under the advice of counsel. This was clearly proved on the last trial.

If there had been a *prima facie* case made out, the advice of counsel, upon a full understanding of the case, would have been a sufficient defense—a complete defense—but there was no *prima facie* case. The charge made by Seale was true—indisputably true; so the record shows; there is no pretense that he made a false charge; there is nothing which raises the presumption of malice.

The lawyer advising, and the magistrate issuing, the writ, may have erred; the fault was certainly not with Seale; and to permit judgments to be entered upon verdicts like this, is to make Courts engines of oppression, instead of guardians of the right.

We insist there is no foundation or cause whatever for the recovery, and ask the protection of this Court in the premises.

The charge here made was substantially true; to sustain this action, it must appear that the charge was maliciously false. (2 Greenleaf Ev. Sec. 453, 2; *Cohen v. Morgan*, 6 Dow. & Ry. 8; *Johnson v. Sutton*, 1 Term R. 540; *Austin v. Dehman*, 3 B. & C. 139; *Bailey v. Bethum*, 5 Taunt. 580; *Grant v. Duel*, 3 Rob. La. 17.)

It is for the Court to determine on the facts whether there was probable cause. (2 Greenleaf, Sec. 453.)

The advice of counsel, upon a full statement, was probable cause. (2 Greenleaf Ev. Sec. 459; *Stone v. Swift*, 4 Pick. 393.)

The facts not justifying the advice, or the arrest, are chargeable upon the attorney and magistrate, and not upon the appellant.

[219] *There being probable cause for the charge made, malice is not material. (1 Term R. 545.)

Cook & Fenner, for Respondents.

In actions of this nature the jury are the judges of the facts and measures of damages, and unless the damages are outrageously excessive, a Court never interferes.

Upon this question we submit, that the damages are moderate, and the Court below has twice so decided, on motion for a new trial.

The plaintiff and defendant were both men of good standing in the community, and the defendant procured his arrest on a warrant, upon the single ground that he refused to deliver up two notes, which had been paid and canceled, and the defendant at the time holding a receipt of their payment; charging the plaintiff with having fraudulently converted said notes, and disposed of the same with the intention of defrauding him, the defendant.

The facts themselves show that the prosecution was instituted for the only purpose of harrassing the plaintiff, and injuring his character.

They were both contractors, and this means was resorted to for the purpose of poisoning the minds of the community against Potter. And Seale even threatened if he did not deliver up the notes he would give him trouble and annoy him.

This Court separately decided that the granting or refusing a new trial is a matter resting in the Court below. (*Drake v. Palmer*, 2 Cal. 117; *Cook v. Stewart*, 2 Cal. 348; *Baldwin v. Pol-lard*, 2 Cal. 582; *Bartlett v. Hoyden*, 3 Cal. 55; *Speck v. Hoyt*, 3 Cal. 413; *Taylor v. McKinly*, 4 Cal. 104; *Watson v. McClay*, 4 Cal. 288; *Taylor v. Cal. Stage Co.*, 9 Cal.; *Deer Creek & H. C. T. Co. v. Wayne*, Oct. T. 1856; *Weaver v. Page*, Oct. T. 1856; *Farrs v. Graves*, January T. 1856.)

It is not insisted that defendant acted under the advice of counsel.

There is nothing in the record showing how the Court charged upon that point, and in the absence of any instructions or exceptions the presumption is, that he put the case fairly to the jury.

The farthest any Court has ever gone, is, that if a party lay the facts of his case fairly before counsel, and acts in good faith upon the opinion given upon such counsel, it is sufficient evidence of probable cause. (*Hall v. Suydam*, 6 Barb. 83.)

In this case, the party did not lay the facts fairly and fully before his counsel, and the counsel advised him that he had a perfect legal remedy in a civil action, to recover the possession of the notes, and he persisted in proceeding criminally. (See 10 Mod. 214; Mod. 306, and notes; 1 Stra. 691.) But it has been held in England, that it is not a defense to prove advice of coun-^scounsel, if the facts are incorrectly stated, [220] or the opinion ill-founded. (*Howlett v. Crutchly*, 5 Taunt. 277).

The jury have passed upon the question, and this Court should not disturb it. The Court below, after hearing the case, the evidence and the counsel, refused to disturb the verdict.

Again: On the former argument of this case, the Court refused to hear discussed the question of damages, and stated that that was a question for the jury, and it did not wish to hear it discussed. And by reference to the record and the opinion delivered by HEYDENFELDT, J., it will be seen that he decided it under an error as to the facts stated in the record, and con-founded the answer with the statement of facts.

It has also been held that an action for malicious prosecution lies for a bad indictment. (*Pippet v. Hearn*, 5 Barn. & Ald. 634; reported in 7 Eng. C. L. 217. See to same point, cases above cited.)

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

This was an action for a malicious prosecution. In the Court below the plaintiff had judgment, and the defendant appealed.

The case was decided by this Court in October, 1855,* and the judgment reversed, and the cause remanded. Upon a second trial in the District Court, the plaintiff again recovered, and the defendant again appealed. The case now comes before us with some additional facts, not contained in the previous record.

Public policy and public security alike require that prosecutors should be protected by the law from civil liabilities; except in those cases where the two elements of malice in the prosecutor, and want of probable cause for the prosecution, both concur.

Though malice be proved, yet if there was probable cause, the action must fail. Malice may be inferred from want of probable cause, but want of probable cause cannot be inferred from malice, but must be affirmatively shown by the plaintiff. As to the question of malice, it is one solely for the jury, and to sustain this averment, the charge must be shown to have been willfully false. Probable cause is a mixed question of law and fact. Whether the alleged circumstances existed or not, is simply a question of fact, and conceding their existence, whether or not they constitute probable cause is a question of law. Where the circumstances are admitted, or clearly proved by uncontradicted testimony, it is the province of the Court to determine the question of probable cause, and the Court may order a nonsuit. But if there be a conflict of testimony, or the credibility of witnesses is to be estimated, the cause must go to a jury. As the question of probable cause is a mixed question of both law and fact, it is error to submit to the jury to say whether there was probable cause. The jury have solely the [221] *right to decide, in cases of reasonable doubt, whether the alleged circumstances really existed. Probable cause is a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true. (2 Green. Ev. secs. 453-7; 6 Barb. 86, and the authorities there cited.)

These principles seem to be well settled, both by measure and authority; and it only remains to apply them legitimately to the state of case presented by the record.

In this case, the testimony fills but a small space in the record. There were but few witnesses examined; their credibility stands unimpeached, and there is not the slightest perceptible conflict between them. It is, then, one of those cases where the circumstances are clearly established; and the only question to determine is whether these circumstances, in themselves, constitute probable cause.

As two distinct juries, at different terms of the District Court, have found heavy damages for the plaintiff—the first for three thousand three hundred and seventy-five dollars, in August, 1855; and the second for three thousand three hundred and ninety-four and 34-100 dollars, in October, 1856—and the learned Judge before whom the cause was tried, refused to grant

the defendant a new trial in both instances, we are placed in a position of grave responsibility; and it will, therefore, be proper to state the circumstances under which the prosecution was commenced by the defendant, more in detail than would seem necessary in ordinary cases.

The facts of the case, as stated in the record, were substantially these: In May, 1855, Seale executed to Potter two promissory notes for two thousand dollars each. The notes were afterwards fully paid by Seale, but not delivered up by Potter, Seale taking from Potter a receipt acknowledging full payment of the notes, which receipt was executed long before the arrest of Potter. A witness for plaintiff stated "that he returned from the Atlantic States in January, 1855, and that afterwards defendant called at his office and had a talk with the plaintiff, his brother, about the two notes above mentioned; that his brother claimed that Seale owed him some sum of money less than one hundred dollars, and for that reason alone, he refused to deliver to defendant those two notes; that one of said notes was then hypothecated, and the money to redeem the same was paid by witness; that the hypothecation spoken of was before the note was due, and known by defendant; that defendant also told him that unless the plaintiff delivered up said notes, he, defendant, should annoy or give plaintiff more trouble than they would be worth to him."

A witness for the defendant testified, that at the time of the arrest, and previous thereto, witness was acting as the *attorney for the defendant, and, at the request of the [222] defendant, called upon the plaintiff, "and I told plaintiff I acted for defendant, and demanded of him to deliver up the two notes here offered by plaintiff—that the defendant, Seale, had been informed that he either had or was about to hypothecate said notes again, and that he was acting wrong if he did not give up said notes. Plaintiff made no denial of these statements, but replied that he would not be forced to do anything—that he would not be insulted in his own house. Witness replied, it is not my intention to insult you. Have you the notes? Plaintiff answered, it is no one's business whether I have or not. Witness replied that defendant would be compelled to institute legal proceedings. Plaintiff replied he did not care a —, let the defendant do as he pleased; there were unpleasant feelings existing between them; they were both contractors, and likely one had underbid the other on a contract." Witness further stated, "that after the interview with the plaintiff, the defendant further consulted witness as to his remedy at law, and what was the most advisable course for him to pursue in order to obtain possession of the notes; that witness advised defendant that he had two remedies, either of which he had the right to pursue, one was by making a complaint before the recorder and obtaining the arrest of the plaintiff, and the other by proceeding in equity to obtain a cancellation; that the latter proceeding was expensive and difficult. Witness drew up the

complaint presented to the recorder, and took charge of the matter for and in behalf of defendant."

The complaint alluded to by the last witness was as follows:

STATE OF CALIFORNIA, }
County of San Francisco. } ss.

Henry Seale, being duly sworn, says, that about the 4th day of May, 1854, he gave and executed to one Charles S. Potter two certain notes, of the amount of two thousand dollars each; that afterwards said notes were fully paid and discharged by this affiant; that he has demanded repeatedly of said Charles S. Potter said notes, and that said Potter has given various reasons for not delivering the same; that at one time he has said he had hypothecated the same to raise money—and again, that he had them in his possession, and would not deliver them to this affiant; that this affiant is informed, and verily believes, that said Charles S. Potter has fraudulently used, transferred, and assigned, said notes, with the intent to defraud, deceive, and cheat this affiant, and this affiant verily believes that said Charles S. Potter refuses to deliver said notes, for the reason that he is about to, or has assigned, or transferred, said notes, for the purpose and with the intent to defraud some person.

Affiant further states that he believes, from what said [223] Potter told him when he paid *the first of said notes, that the same was hypothecated, and that the said Potter afterwards obtained the possession thereof, and refuses, from some causes, to deliver the same to affiant:

Wherefore, affiant prays that said Potter may be arrested for fraudulently assigning, transferring, or using, the personal property of affiant, and that he may be dealt with according to law.

[Signed]

HENRY W. SEALE.

Subscribed and sworn to before me, the twenty-second day of March, 1855.

[Signed]

R. H. WALLER, City Recorder.

A warrant was issued by the recorder, and the plaintiff arrested. "The defendant went with the constable, who had the warrant, down on Market street, and told him to arrest the plaintiff. After getting down to the plaintiff's place of business, the defendant pointed it out to the officer; the officer went and arrested the plaintiff, and the defendant and another person followed the officer and the plaintiff, so under arrest, through the different streets up to the police-office, where the plaintiff was discharged, on bail, until the next day. On the next day, the plaintiff appeared before the recorder, and produced the two notes mentioned in the affidavit of arrest, and the defendant offered no proof, and the plaintiff was fully discharged and acquitted."

On the trial before the District Court, the plaintiff produced and read in evidence the two notes mentioned.

Was the conduct of the plaintiff such as to afford the defendant reasonable ground for believing that the plaintiff had fraudulently used, transferred, and assigned the notes, or was about to do so, with intent to deceive and cheat the defendant, or some other person?

The fact that defendant had paid the notes without their being delivered, shows clearly the friendly relation existing between the parties, and the willingness of the defendant to oblige the plaintiff.

It is clearly shown that the plaintiff, after receiving the money, did not apply it to redeem the notes, but used it for *other* purposes. At the time defendant called upon the plaintiff, as stated by plaintiff's brother, one of the notes was still pledged, and the witness afterward advanced the money to redeem it. At that time, plaintiff refused to deliver the notes, upon the sole ground that he claimed that the defendant owed him "some sum of money less than one hundred dollars;" while the fact was, that one of the notes was then hypothecated and in the hands of another, and the plaintiff had to borrow the money to redeem it. When afterwards called upon by defendant's attorney, the plaintiff replied that "he would not be forced to do *anything; that he would not be insulted in his own [224] house;" and refused to give any satisfaction as to whether he had the notes or not, alleging it was no one's business. He did not then predicate his refusal to return the paid notes upon the ground that defendant owed him anything, but said there was unpleasant feelings existing between them, and that they were both contractors, and *likely* one had underbid the other on a contract. If there existed any other cause for unfriendly feelings between the parties, except the fact that plaintiff had been paid in full for the notes and refused to return them, it is not shown in the record.

And the conclusion is irresistible, that the alleged claim of less than one hundred dollars, and the reason given by plaintiff for the unpleasant state of feeling existing between them, were mere pretenses in excuse for the conduct of plaintiff in refusing to deliver the notes. Having used the money for other purposes, leaving the defendant still liable upon the notes; and without any security that they ever would be redeemed by plaintiff, it was very natural that the plaintiff should seek some plausible justification of such unjustifiable conduct. And, looking to the whole conduct of the plaintiff, we are compelled to reiterate the view formerly expressed by the learned Judge who delivered the opinion of this Court, that "the conduct of the plaintiff in reference to his business transaction with the defendant, was reprehensible in the last degree, and we should be sorry to think that the commercial morality of the age could tolerate it in any other aspect than as dishonorable and unconscientious."

It would seem, from all the circumstances, that the defendant had ample grounds to satisfy a reasonable man that the plaintiff intended to defraud some one, if he had not already done so.

He had been fully paid, and the payment must have been made with the understanding that the notes would be redeemed with the money paid by defendant. They were not so redeemed, and this fact alone was good ground for suspicion. But when called upon at different times to return the notes, and still refusing to do so, the plaintiff, by his own conduct, gave the defendant the most just grounds for suspicion. I confess I cannot see what other inference defendant could draw. There was certainly not the slightest honest reason for plaintiff's conduct. Even conceding he had what he considered a good claim against the defendant for a less sum than one hundred dollars, he had no right to retain the two notes, for four thousand dollars. He had no lien upon the notes, equitable or legal.

If these views be correct, then the facts, as clearly proved, justified the defendant in the belief stated by him in his affidavit, and he was, therefore, not to blame for stating what he did.

But the facts, as stated in the affidavit, did not authorize [225] the *arrest of the plaintiff, and the question arises whether the defendant should not be held responsible for the error in law.

In the case of *Hewlett v. Crutchley*, 5 Taunt. 277, it was held, that a defendant, by obtaining the opinion of counsel, by applying to a weak or an ignorant man, could not shelter his malice in bringing an unfounded prosecution. But in that case, the defendant was not only an attorney himself, but it was shown that the defendant knew that the alleged facts, upon which the prosecution was founded, were untrue. It was also shown that the defendant did not fairly state all the facts to his counsel, but only a part of the case.

But in the later case of *Cohen v. Morgan*, 6 Dow & Ry. 8, it appears that the defendant simply stated the facts before the Justice, and it was held, that "it was for the Justice to say whether the facts amounted to a felony, and to determine whether he would, or would not, issue his warrant to apprehend the party accused."

In the case of *Stone v. Swift*, (4 Pick. 389,) the learned Judge who delivered the opinion of the Court, said:

"But, as has been observed, all the counts are founded upon the knowledge of Swift, that he had no just cause of action when the suit was commenced. Upon considering the evidence in the case, the Court do not perceive that the jury could properly have found that to be the fact. It appears that Swift acted upon advice of counsel. If he did not withhold any information from his counsel, with the intent to procure an opinion that might operate to shelter and protect him against a suit, but, on the contrary, if he, being doubtful of his legal rights, consulted learned counsel, with a view to ascertain them, and afterwards pursued the course pointed out by his legal advisor, he is not liable to this action, notwithstanding his counsel may have mistaken the law."

And in the case of *Hall v. Suydam*, 6 Barb. 83, it was said by

PAIGE, P. J., that "if a party lays the facts of his case fully and fairly before counsel, and acts in good faith upon the opinion given him by such counsel, (however erroneous that opinion may be,) it is sufficient evidence of probable cause, and is a good defense to an action for a malicious arrest. But in such a case, it is properly a question for a jury whether such party acted *bona fide* on the opinion given him by his professional adviser, believing that the plaintiff was guilty of the crime of which he was accused, or that he had a good cause of action against the plaintiff."

In this case, the defendant seems to have laid his case fully before his counsel, and before instituting proceedings, the counsel demanded the return of the notes from the plaintiff, and heard from him the alleged ground upon which he refused to return them. The counsel was then in possession of all the material *facts of the case, and the arrest was [226] made under his advice, and by his professional assistance. It is true, that the question whether the defendant acted *bona fide* under the advice of his counsel, is a question of intention to be determined by the jury, in all cases where there is any legitimate evidence to show a want of good faith in following professional advice. But in this case, as in the case from Pickering, already quoted, we do not see that the jury could have properly so found. There was no evidence to show bad faith in the defendant. He was justified in the statement of facts and belief made in his affidavit, and as to his mistake of law, there is much better reason for it, on his part, than for the same mistake in reference to the same question, on the part of his counsel and the recorder. From the nature of the case, the mistake was not so great as is often committed by attorneys and officers of the law. There is no great difference in morality and common sense between a fraud committed by putting in pledge notes already paid, and obtaining money under false pretences. The distinction is more technical than real. The fraudulent motive is essentially the same in both cases, and the injury to the party defrauded is in substance the same.

But while the conduct of the plaintiff was reprehensible in the last degree, that of the defendant was by no means blameless. His following the plaintiff, while under arrest, through the streets, certainly did show malice. Still, it must be conceded that if malice could be justified, the defendant had some cause for it. Both parties seem to have had a due share of it. But there was this difference between the two parties; before the arrest the only cause plaintiff had for his malice was his own misconduct towards the defendant, while the defendant had not his own misconduct against the plaintiff, but that of the plaintiff against him—the defendant—as his excuse.

From a consideration of the circumstances of this case, and the law applicable to them, our conclusion is, that there was probable cause for the arrest of the plaintiff, and that this action cannot be maintained.

Judgment reversed, and the cause of plaintiff dismissed.

[227]

*DAVIDSON v. DALLAS.

¹ **PRINCIPAL, WHEN LIABLE FOR ACTS OF AGENT.**—Where an agent, on behalf of his principal, performs an unauthorized act—yet if the principal has put the agent in a position to mislead innocent parties, he is responsible to them.

¹ **IDEM.**—And a subsequent general power from the principal to the agent, to sue for all sums due the principal, and to execute all instruments necessary to carry the power into full effect, will, as to innocent third parties, bind the principal for obligations incurred in the collection of a loan, which was unauthorized as between the principal and agent.

² **ATTACHMENT BOND NECESSARY.**—An indemnity bond to the sheriff to retain property seized under attachment, is an instrument necessary to carry the power to sue into effect.

AGENT, RATIFICATION OF ACTS OF.—A ratification of the unauthorized acts of an agent, can only operate after full knowledge of those acts.

ATTACHMENT, CLAIM OF THIRD PARTY.—Where property was seized under two attachments, and the property was claimed by a third party, whereupon both attaching-creditors indemnified the sheriff, who went on and sold it, and paid the proceeds to the first attaching creditor, the amount not equaling his judgment—and afterwards, the party claiming the property, obtained judgment against the sheriff for the value of the property: *Held*, that the recourse must be had against the first attaching-creditor, for whose benefit the property was sold.

IDEM.—In such case, the attaching-creditors do not stand in the position of joint trespassers, the seizure of the second being subject to the first.

IDEM.—SHERIFF AS AGENT.—The sheriff was the separate agent of both attaching creditors, but in the order stated, and as he disposed of the property to the benefit of the first alone, he must look to him, and not the second attaching-creditor.

JUDGMENT, CONCLUSIVENESS OF RECORD.—A judgment-record is only conclusive between the parties and their privies, except in some cases for specific purposes.

IDEM.—When a judgment-record is used in evidence, it can only be considered as conclusive evidence, where its operation is mutual, and concludes both parties.

ATTACHMENT—TRIAL, OF CLAIM TO PROPERTY.—Where property attached is claimed by a third person, the sheriff may protect himself before a jury of six persons, and if the verdict be in favor of the claimant, he may relinquish the levy, unless indemnified. If he gives the bond of indemnity, it will only inure to the benefit of the owner of the property, so far as the consequences which result from his own acts are concerned.

IDEM.—SHERIFF AS AGENT.—When the sheriff attaches property of the defendant, he does it as the officer of the law. If it is not the property of the defendant, he is the agent of the attaching creditor.

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

B. Davidson, the plaintiff in the Court below, as the assignee of W. R. Gorham, sheriff of San Francisco, brought this action against A. G. Dallas, E. R. Falkner, and Bernard Peyton, on a bond for one hundred thousand dollars, given by them to W. R. Gorham, under the following circumstances.

1. One Gilson sued out an attachment against Meiggs, for thirty-five thousand dollars, and had the steam-tug "Underwriter" seized by Gorham, sheriff of the county of San Fran-

1. Cited *Hall v. Crandall*, 29 Cal. 571.

2. Doubted, same case, 15 Cal. 79; distinguished, *Lewis v. Johns*, 34 Cal. 633.

cisco, on the 8th day of December, at thirty minutes past twelve o'clock, A. M.

2. One McPherson claiming to act as the agent of defendant Dallas, also sued out an attachment against Meiggs for twelve thousand five hundred and forty-two dollars, which was also *levied on the "Underwriter" on the same day at [228] two o'clock A. M., being after the levy of the other attachments.

3. Davidson, the plaintiff, claimed the the "Underwriter" as his property; whereupon bonds of indemnity were required by the sheriff from both Gilson and Dallas.

4. A separate bond was accordingly given by Gilson, with sureties, and also a separate bond executed by McPherson, as agent of Dallas, with sureties; each bond indemnifying the sheriff for detaining the property under the respective attachments.

5. On the 12th of December, 1854, Davidson sued Gorham for the seizure of the vessel, and on the 16th of January, 1855, recovered judgment against him for the sum of eighty-five thousand dollars.

6. McPherson and Gilson both had notice of the trial of *Davidson v. Gorham*, and both assisted to defend it.

7. The sheriff has not paid the judgment of Davidson against him, but assigned to Davidson the bond of indemnity, executed by McPherson as the agent of Dallas.

8. Davidson brought this suit upon this bond, and recovered judgment in the Court below, against Dallas and his sureties, for the full penalty of the bond, namely, one hundred thousand dollars, and they appealed.

9. Before the case of *Davidson v. Gorham* was finally disposed of, and while the same was pending in this Court, on appeal, McPherson (claiming to act for Dallas) and Gilson entered into an agreement, by which it was stipulated "that in case the decision of the Supreme Court shall be given in our favor, and that the vessel shall not produce sufficient to satisfy both demands, with costs of suit, we will divide the net amount received *pro rata*, in proportion to the several amounts due us, and pay all necessary expenses occurring, in the same proportion, with the exception of the fees charged by our respective solicitors, which we agree to pay individually; and in case the said suit shall be decided adverse to us, we agree to pay the necessary expenses in the same proportion, except the fees of our solicitors."

10. Dallas, who resided in Scotland, sent to McPherson the sum of twenty thousand dollars, to purchase a prior mortgage upon certain land, on which Dallas held subsequent mortgages. At this time McPherson had no formal power of attorney from Dallas.

11. McPherson, finding he could not, at the time, purchase in the prior mortgage, took the responsibility of lending the money, in part, to Meiggs, taking the two notes to Meiggs, the one pay-

able to "A. W. McPherson, agent for A. G. Dallas, or order," and the other to "A. W. McPherson, agent, or order." [229] These *notes he endorsed to Dallas, before commencing the suit of *Dallas v. Meiggs*.

12. McPherson afterwards received from Dallas a regular power of attorney, authorizing him "to enter into and to take possession of all lands, tenements, and real and personal estate, whatever, in said State of California, or elsewhere within the United States of America; and to uplift, recover, sue for, and discharge, all sum or sums of money, due and addebted to me, within the said State; with power to my said attorney to arbitrate, compromise, and amicably settle, all questions in which I may be in any way, or to any extent, interested within the United States, and to enter into, subscribe, and deliver, in due form of law, all deeds requisite for these purposes, or any of them; with power also to sell and dispose of said real and personal estate, or any part or parcel thereof, or interest therein, and to grant all necessary deeds and acquittances, to carry these powers into full effect; as also, generally to manage my affairs in said States." This power of attorney was executed in Scotland, August 24, 1854, and received by McPherson, October 25, 1854. The first note of Meiggs was for four thousand eight hundred and ninety-two dollars, dated September 18, 1854; and the second for seven thousand six hundred and fifty dollars, and was dated October 3, 1854.

13. Gilson obtained judgment against Meiggs, upon which execution was issued, September 29, 1855, for thirty-eight thousand five hundred and seventeen dollars and twelve cents, under which the vessel was sold, October 8, 1855, for thirty-five thousand dollars, and the proceeds paid to Gilson.

14. On the 2d of January, 1856, Gorham, for the consideration of two thousand five hundred dollars, paid by Gilson, released the sureties of Gilson from all liability upon the indemnity bond given by Gilson.

15. The bonds given to the sheriff by Gilson and McPherson, were each for the sum of one hundred thousand dollars.

On the trial, among other things, there were introduced in evidence by the plaintiff, the judgment-records, and proceedings thereunder, in the case of *Dalls v. Meiggs*, and *Davidson v. Gorham*, under the exception of defendant's counsel.

A. W. McPherson was examined as a witness by the defense, and testified as follows:

"Falkner and Peyton, the sureties, executed the indemnity bond at my request. I first asked them the day it was executed. The bond was signed at the sheriff's office in the presence of the clerk who drew it out. The clerk was a Mr. Brady, who, I think was deputy-sheriff. Mr. Falkner, when I asked him at his office to sign, asked me if Mr. Dallas was to be responsible for it. I told him that Mr. Dallas was to be responsible. I then assured him that Mr. Dallas would protect him. He [230] knew I *represented Mr. Dallas. I told him I had a

power of attorney in the sheriff's office. Mr. Falkner said if the case went against us he would be ruined. I then assured him that Mr. Dallas would protect him. I signed the bond first. I did not show the power of attorney. Falkner asked me frequently whether it was Dallas' bond. He refused to sign my bond. The bond, when executed, was delivered to Mr. Brady. Mr. Dallas had then, and has now, a large property in this State. I directed the suit of *Dallas v. Meiggs*, to be brought. Dallas remitted me twenty thousand dollars for investment in August, 1854. I received it in August, 1854. A portion of this I invested in Meiggs' warrants (forged warrants,) about thirteen thousand dollars. I brought the suit of *Dallas v. Meiggs* to recover the money. It was in this suit that the indemnity bond was given. The investment in warrants must have been in September or October, 1854. It was under the power of attorney in evidence that I executed the bond. I received the money before I received the power of attorney. The warrant investments were all made by the 1st of October. The money was sent me for a different purpose. It was sent to purchase the Saucelito Rancho mortgage of Barton Ricketson, and upon which Mr. Dallas had other mortgages subsequent to that of Ricketson. I tried to buy it and could not, and in the mean time I invested the money in short loans, and I had invested some of the money in the warrants before I received the power. First investment before I received the power, the other after. So far as these short loans to Meiggs are concerned, they were made without authority from Dallas. I considered this as Dallas' debt when the suit was brought. I had invested other money for Dallas before this. Mr. Dallas has mortgages upon the Saucelito Rancho, a house in Sacramento street, and money in the hands of Falkner, Bell & Co., who for six months have been acting as his agents. The mortgages belonging to Dallas in the Saucelito Rancho amounts to thirty thousand or forty thousand dollars. He has also a mill on the Albion Rancho.

"I think Mr. Falkner did not see the power of attorney when I received it. He alluded to the suit of *Davidson v. Gorham*. I knew of that suit when I signed the bond, and I wrote to Mr. Dallas about the proceedings in regard to the "Tug Underwriter." I did not draw upon him for the expenses, nor upon Jardine, Matheson & Co. I did not pay the keeper's fees out of any of Dallas' money.

"The Ricketson mortgage was a prior one to Dallas', and the purchase of it was intended to protect his mortgages. I wrote to Mr. Dallas about the Underwriter suit, some time after the attachment. Don't recollect whether it was before or after the bond."

The plaintiff had judgment in the Court below for the full * amount of the bond, one hundred thousand dollars. [231] Defendants moved for a new trial, which being denied, they appealed.

Saunders & Hepburn, for Appellants.

That in the Meiggs loan, McPherson acted without authority from Dallas, who has never ratified it; and that therefore said debt from Meiggs was never, in fact, owing to Dallas, and said suit was therefore not authorized under the power.

When Mr. Dallas remitted the twenty thousand dollars, it was, in the strictest sense, the creation of a special agency. There were no antecedent relations between McPherson and Dallas, from which an authority could be inferred. The loan to Meiggs was utterly unauthorized, and at the risk of McPherson, who is now responsible to his principal for the amounts invested and lost, not as a guarantor, but in money had and received.

There can be no doubt of this. There is no evidence of ratification by Mr. Dallas, nor even of notice, except by the mailing of a letter, which he is not proved to have received, nor its contents proved in the cause.

There is no evidence of notice to Dallas of the execution of the bond, even by mailing a letter of advice.

If it be contended that Dallas clothed McPherson, by the remittance, with ostensible ownership of the money, so far as to protect third persons in their dealings with the agent, the answer is:

The very causes of action in *Dallas v. Meiggs*, showed the agency of McPherson; and the acceptance of the Meiggs note, by Dallas, to have been, if at all, by procuration; putting all persons dealing with McPherson, in respect of them, distinctly upon inquiry as to the fact of acceptance, and as to the fact and extent of his authority.

Both these notes (in *Dallas v. Meiggs*) were originally made to McPherson, and endorsed by him to Dallas, upon the eve of the suit.

If an agent, to whom money is remitted for a prescribed investment, may not only appropriate it to his own use, or divert and lose the fund, but involve his principal in prospective engagements, (although actually unauthorized,) because he is in the possession of the money, then there must be an end of all monetary enterprise, beyond the immediate supervision and control of a capitalist. A factor, being in possession of goods, may sell on credit, and the purchaser insist upon a set-off against the factor. But a factor, as such, cannot sell the goods, receive the money, and invest in a manner to involve further and unauthorized responsibility of his principal. So, an agent entrusted with commercial paper, negotiable by delivery, may, so far as third persons are concerned, misapply it against his instructions.

The case at bar is distinguishable from all such cases, [232] in this: *that in the others, the property itself being placed in the possession of an agent, with all the *indicia* of ownership, it would be a fraud upon third persons to insist upon less power, by private instructions, than he gave by his acts, which alone are observable and known to the business world. The property is therefore answerable, and only the

property. In this case, not only is the money remitted lost, but another liability incurred, although the sheriff (the party treating) was distinctly informed of the fiduciary capacity of McPherson, in receiving the notes; and the notes in his hands actually unendorsed by Dallas. (See Story on Agency, Secs. 443, 444, for instances of the former class of cases.)

The bond is unauthorized by the power. The agency it created is special, for it enumerates specifically the contemplated acts of the attorney, and the general clauses afterwards occurring in the power, do not enlarge its operation, but only express what an attorney would, in any event, have by necessary implication of law. The special powers are:

1. To sue for, recover, and receive money and property, owing or belonging to the principal at the execution of the power, and to arbitrate, compromise, and amicably settle for the same, and to enter into, etc., all deeds, etc., that may be requisite for these purposes.

2. To sell property, and execute all necessary deeds, etc., to carry the foregoing powers into effect.

3. To manage the principal's affairs, and do any other act in the premises, etc.

The general clause in this power is expressly confined to the special purposes previously defined.

If it were not, it could, upon a well-settled rule of construction, have no more extended operation. (See *Billings v. Mann*, S. C. Cal., Jan. Term, 1857; *Rossiter v. Rossiter*, 8 Wend. 494.)

In the construction of a formal power, the bond, to be valid, must be within the express terms of the power, or necessarily implied as incident to an express power, and indispensable to its effectual and ordinary exercise. (Paley on Agency, marginal page, 192; Story on Agency, Secs. 76, 77.)

In the case at bar, it will not be contended that the act in question is authorized by the concluding general clause, "to manage," etc., but that the power to execute deeds, will or may include a bond given in the course of, and to promote the purposes of, a suit properly instituted, or the collection of a debt under the power.

Now, it is evident that the power to execute deeds, in the connection in which it appears in this instrument, imports no substantive power of itself. It is indicated as a means of executing certain special powers just before enumerated, which are, "to sue," etc., and to "compromise," etc., and must, of course, be confined to the execution of those powers, not [233] regarding them as a mere motive or suggestion to its exercise, upon any occasion, and in any manner, at the discretion of the agent, but naturally flowing from the specified act, as a usual and natural means of accomplishing it.

It is not the intent of the agent, however *bona fide*, that will validate the act, but the special intent of the principal, discernible upon the face of the power, and by a strict construction. (See *Hubbard v. Elmer*, 7 Wend. 448.)

It is submitted, that the bond being authorized by the power, and Mr. Dallas not bound, his sureties are released:

1. Because the instrument purports to be the undertaking of Dallas, as principal, and Falkner & Peyton, as sureties; and within the principle of *Bryan v. Berry*, 6 Cal. 394, ought to be construed as the principal undertaking of Dallas, and that of the sureties as accessory.

In which case they are not bound for want of a principal engagement. (1 Pothier on Obligations, page 176.) Which is identical with the English law, when the character of principal and secondary obligations is once established.

2. The undertaking is incomplete, and shows the intention of the sureties to be bound with Dallas, and not without him. (See *Wood v. Washburn*, 2 Pick. 24; *Bean v. Parker*, 17 Mass. 604.)

The principle is the same where the defect is by incapacity of the principal, and, of course, where the execution is unauthorized. (See *Burge on Suretyship*, 6, 7, and notes.)

3. The sureties are affirmatively proved to have executed expressly with the view of the responsibility of Dallas to them. McPherson represented himself as fully authorized, and Falkner indicates his reliance upon the responsibility of the principal, at the time of the execution and delivery of the bond, in the most positive manner. His being an ostensible principal in the bond and the sureties' evident reliance upon him, brings the case clearly within the principle of the most exacting cases. (See *Leafetal v. Gibbs*, 19 Eng. C. L. 604; *Parker v. Bradley*, 2 Hill, 586, and cases cited.)

There is no breach of the conditions of the bond, and no damage proved. The condition is to indemnify the sheriff for detaining the property levied on:

1. The proof (record of *Gilson v. Meiggs*) shows the original seizure to have been in another cause. The record of *Davidson v. Gorham*, (the judgment in which is attempted to be used here as affording a measure of damages, and to show that liability has been incurred by the sheriff, within the recital and conditions of our bond,) shows only that the damage recovered was attributable, not to any act of the sheriff, in *Dallas v. Meiggs*, but to his conduct in *Gilson v. Meiggs*. See answer in [234] *Davidson v. Gorham*, in which defendant justifies by process in the *Gilson* case alone.

2. The sheriff voluntarily abandoned our process and lien, and converted the property, under final process, in *Gilson v. Meiggs*.

Under our attachment, as long as the stipulated detention continued, the property was responsive to the undertakers in the case. The sheriff, upon receipt of execution in *Gilson's* case, might have re-delivered the property to Davidson, or required indemnity upon sale. His indefinite engagement to detain the property in the *Dallas* case, was then performed. He had detained her until other and inconsistent process issued, commanding him not to detain her. He chose to sell her, which occa-

sioned the contended loss, which, until his sale, was represented by the property itself, and a sure indemnity against damage or liability by the intention. The sheriff now seeks to make a guaranty against loss by our detention, an indemnity against the loss of the vessel, under a foreign process, which he was not bound to obey, and ought not to have obeyed, without an indemnity against loss or liability by that act. The end of this detention, under our process, was when he was obliged, by receipt of an execution, to deliver up the vessel to Davidson, or sell her under the execution.

The sheriff was bound to see to the application of all other sureties of the principal. Here he has literally, for a consideration, actually sold the lien of the principal. And it will not strengthen his case, that he did so without the assent of the principal—in actual fraud of his rights, as well as his sureties. (See Story on Contracts, Sec. 872.)

S. Heydenfeldt, for Appellant.

It was urged, however, by the respondent, in the argument at the bar, that the suit in the name of Dallas was a ratification, because, as it was said, it was a record, and imported verity, it could not be disputed, and was conclusive. This argument evinced so great an error of the governing legal principal, as to make it appear almost a waste of time to answer it. Records are only conclusive between parties and privies, and must be mutual. Greenleaf says: "But to prevent this rule from working injustice, it is held essential that its operation be mutual. Both the litigants must be alike concluded, or the proceedings cannot be set up as conclusive upon either." (1 Green. Ev., Sec. 524.)

In this case, Gorham was no party to the suit of *Dallas v. Meiggs*, and as he is not concluded by it, so cannot be Dallas.

What, then, is the effect of the record in that suit? I give the answer by another quotation from the same author: "A record may also be admitted in evidence in favor of a stranger against one of the parties, as containing a solemn admission or judicial *declaration by such party in regard to a certain [235] fact. But in that case, it is admitted, not as a judgment conclusively establishing the fact, but as the deliberate declaration, or admission, of the party himself, that the fact was so. It is therefore to be treated according to the principles governing admissions, to which class of evidence it properly belongs." (Green. Ev., Sec. 527.)

The rule, as thus laid down by Greenleaf, applied to this case, makes the record in *Dallas v. Meiggs*, merely an admission of the former that he authorized the suit, but, like all admissions, leaves it liable to be rebutted by showing the truth.

3. The rules of law require greater strictness in the interpretation of powers of attorney, than any other instruments, and nothing can be taken by implication unless it is so clear as to exclude every other conclusion.

To imply, therefore, that in the power from Dallas to McPherson, is contained authority to execute a bond of indemnity, is carrying construction to its extremest latitude. It is not, in any respect, a necessary incident to the power to sue, for the suit may be commenced, carried on, and concluded, without its exercise; and this is all the right which the power to sue confers.

That a contract of indemnity may be eventually beneficial to the party suing, is no argument in favor of the existence of the power to make it. McPherson might have refused to enter into it, and still the suit would have progressed to a final termination, and thus exhibited a complete, unbroken, efficient exercise of the power to sue. But as this point is satisfactorily treated in the argument of Sanders and Hepburn, I decline its further examination.

4. It is insisted, that no damage was sustained by the sheriff in consequence of the levy under the Dallas attachment. The rule of the law, in regard to the proper measure of damages, confines them to the actual loss, and if there be no loss, then the damages are nominal. Judge STORRY, speaking of the doctrine, says, that "it is a good defense, or rather a good excuse, that the misconduct of the agent has been followed by no loss or damage whatsoever to the principal; for then the rule applies, that although it is a wrong, yet it is without damage; and to maintain an action, both must concur, for *damnum absque injuria*, and *injuria absque damno*, are, in general equally objections to any recovery." (Story on Agency, Sec. 236.)

"Every one," says Lord HOLT, "shall recover damages in proportion to the prejudice he hath sustained." (*Ferrer v. Beale*, 1 Ld. Raym. 692.) In *Walker v. Smith*, 1 Wash. C. C., Judge WASHINGTON says: "The rule is, that the plaintiff should recover so much as will repair the injury sustained by the misconduct of the defendant."

Sedgwick says, "That if loss without legal injury goes undressed, the correlative proposition is equally true, that [236] injury *without loss furnishes no ground for other than nominal relief"—and in a note, he cites a case from 11 Mees & W., wherein ROLF, B., says, "though injury may have resulted to the plaintiff, it is *damnum absque injuria*, and no action will lie." (Sedg. Measure of Damages, 31.)

And again: "Substantial loss to the party must have ensued to entitle him to substantial relief." (Id. 32.)

In this case, before the levy of the Dallas attachment, the property was already seized; afterward sold under the prior attachment. It is apparent, that the Dallas attachment caused none of the injury. This is answered by the assertion, that it is not known that the sheriff would have held the property but for the Dallas bond of indemnity. To this we have two answers; first, a bond of indemnity was already given in the first suit, which was received as satisfactory by the sheriff, and therefore, he was bound to hold the property. Second, we have the sheriff's solemn admission of record, in his answer to the com-

plaint of Davidson, that he seized and detained the vessel by virtue of the Gilson attachment. He calls upon us now for damages. We ask what are they? He points to the recovery against him in the case of *Davidson v. Gorham*; he wishes to conclude us by that suit; but if so, then the rule must work both ways. Examine the case, and not one dollar has been recovered of the sheriff on account of any act of Dallas; the legality of the Dallas levy was not put in issue; the material issue found and determined, was the improper seizure and conversion in the Gilson case; that is all which that record establishes, and it is therefore no evidence to prove loss sustained by the levy for Dallas.

Greenleaf says: "The principle upon which judgments are held conclusive upon the parties, requires that the rule should apply only to that which was directly in issue, and not to everything which was incidentally brought into controversy during the trial." (1 Greenl. Ev., Sec. 528.)

There was but one trespass, because the sheriff was the agent of both attaching-creditors, and performing but one act—that of seizing—affecting one and the same piece of property incapable of subdivision—detaining the property for the same period of time; by his act, he unites all parties by whose directions, or in whose favor he makes the levy, in one trespass, as effectually as if they were all present, and assisting in the manucaption. Nor can it be urged, that a levy made, or rather entered, at two different times, alters this position. For if that be true, then, as there was but one taking, the second levy is no trespass. But the second levy is only made a trespass by relation to the first taking. (See *Winle v. Chetwind*, 1 Dow., N. C. 204; *Chambers v. Coleman*, 9 Dow. P. C. 388.)

Now it will hardly be disputed that one satisfaction is all that can be had for one trespass. (See *Livingston v. Bishop*, 2 Johns. *290; *Thomas v. Rumsey*, 6 Johns. 26; *Campbell* [237] v. *Phelps*, 1 Pick. 62; *Baker v. Lovett*, 8 Mass. 79; *Sanderson v. Caldwell*, 2 Aik. 200, Vermont.)

In *Campbell v. Phelps*, above cited, WILDER, J., says: "If two take the goods of another, or convert them to their own use, and judgment is recovered against one, and afterwards the other pays the value with or without suit, the property will vest in them jointly, or in him who pays the price."

In *Baker v. Lovett*, above cited, C. J. PARSONS says: "Where one trespass has been committed by several persons jointly, the party injured may sue any or all the trespassers, but he can recover but one satisfaction for the same injury. As it is confessed by the pleadings, that the trespass was committed jointly by Dennis and the defendant, and that Dennis has made full satisfaction, the plea in bar is sufficient," etc.

C. Temple Emmett, and *Robinson, Beatty & Botts*, for Respondent.

The appellant's counsel are in error when they assert that we

concede McPherson's want of authority to make the loan to Meiggs.

The record discloses the facts:

1. That the money could not be used in the special purpose for which it is alleged to have been sent by Dallas. And,
2. That McPherson had previously been in the habit of making short loans with Dallas' money.

From these two facts, it may legitimately be deduced that McPherson was authorized to make the loan in question. At least these facts were proper evidence towards establishing the fact of such authority; and, uncontradicted, are sufficient to support a finding that such authority existed. This Court will not disturb the finding of the Court below on a question of fact, except where such finding is a gross departure from the evidence.

We do not, therefore, concede that McPherson was not originally authorized to make this loan.

But we might safely make the concession, since any original want of authority is undoubtedly cured by the record of the suit of *Dallas v. Meiggs*.

No principle can be better settled than that in relation to the effect to be given to judicial records. For all the purposes for which they can be used, they are absolutely conclusive of the facts which they assert. Nothing can be alleged against their truth. The only mode of avoiding their effect is to show that the record is inapplicable to the purpose for which it is attempted to be used, and hence not admissible in evidence.

So absolute is this rule, that it has been uniformly held that the party to a judicial record will not be permitted to avoid or contradict it, even where he can show that his name has [238] been *used without the slightest pretense of authority from him. He may recover damages against the attorneys, and other parties who have, without authorization, bound him by the record. But he cannot destroy the effect of the record itself. (*Field v. Gibbs*, Peters C. C. 155; 7 Pick. 138; *The People v. Bradt*, 7 Johns. 539.)

But Dallas had authorized McPherson to bring this suit. The power of attorney was received before the suit was commenced. Although the powers granted by that instrument are limited in number, they are general in their character. That is to say, the power to sue, for instance, is not confined to suing for a particular and specified debt. It is to sue for all and any moneys due the principal. Hence the power of attorney is what is termed a general power. Now, the money loaned to Meiggs was undoubtedly the money of Dallas. The notes given in evidence of the loan were, in terms, to "McPherson, agent for Dallas, and McPherson, agent." Dallas could have recovered against Meiggs directly, on at least one of the notes, without any endorsement by McPherson; and perhaps on both. Meiggs certainly could not have defeated the action by pleading a want of authority in McPherson to make the loan. Such a plea would have been demurrable.

How absurd it is to say that Dallas could recover money from Meiggs, yet Meiggs was not indebted to Dallas.

And even if the notes had been in the name of McPherson individually, without the addition of agent, after McPherson had endorsed them to Dallas, and suit was brought in the name of the latter, could Meiggs have plead, in the terms of the appellant's argument, that McPherson had no authority originally, to loan the money to him; no authority to endorse the notes to Dallas; that Dallas had never ratified the act; and hence that Dallas could not recover in that action? Would not such a plea on Meiggs' part have been demurrable?

And, finally, upon this point, the bond, upon which this suit is brought, recites the fact that Meiggs was indebted to Dallas.

The attorney is appointed "to uplift, recover, sue for, and discharge all sum or sums of money due, and addebted to me by any person or persons, company, corporation, or firm, within the said States; with power to my said attorney to arbitrate, compromise, or amicably settle all questions in which I may be in anywise, or to any extent, interested, within the said United States; and to enter into, subscribe, and deliver, in due form of law, all deeds requisite for these purposes, or any of them," etc.

To what purposes is this special power to enter into deeds intended to apply? Clearly to the precedent matter of the instrument. And to what portion of the precedent matter? We submit that it must be held to apply to each and every distinct power or purpose preceding it. It cannot be confined to the last *purpose mentioned, "to amicably settle." That, [239] we shall show, is itself made auxiliary to the power to uplift and recover. But assuming for the moment, that it is an independent and principal *power or purpose, we say that the expression "for these purposes or any of them," cannot be confined in its application to the power "to amicably settle," for the words are used in the plural number. Then, if it cannot be confined to the last purpose mentioned, upon what principle can its application be limited to a portion of the precedent purposes? This would be making a merely arbitrary separation of the foregoing matter, for which there is no warrant in the terms or intent of the instrument itself. The word "any" means every, and the expression "for these purposes or any of them," in effect reads: "for the foregoing purposes and every of them." It will not be pretended that to uplift or to recover, etc., debts, is not one of the purposes of the power of attorney.

But a syntactical analysis of the sentence will show that the powers to uplift, recover, sue for, and discharge debts, are the principal purposes of the first branch of the instrument, and that the powers to arbitrate, compromise, and amicably settle, as well as the power to enter into deeds, are made auxiliary to those principal purposes.

The attorney is appointed to uplift, recover, etc., all sums of

money, etc., then, after a semicolon, follow the words: "with power to arbitrate, etc.," the proposition "with," showing the connection and dependence of the second on the first member of the sentence. And then, after another semicolon, "and to enter into all deeds, etc." The conjunction "and," showing a continuation of the connection and dependence of the last upon the first member of the sentence.

To this point, we cite the case of *Trenchard v. Hoskins*, Winch 91, cited in *Gainsford v. Griffith*, 1 Saund. 60, where the grantor covenanted that "he was seized in fee, that he had good power to sell, and that no reversion was in the crown, notwithstanding any act done by the covenantor." It was held that the words "notwithstanding any act done, etc.," referred to the two preceding covenants, and not simply the last. For "the restrictive words coming at the end of the last sentence, may be indifferently applied to both the precedent sentences," and "were omitted at the end of the two first sentences, to avoid tautology and idle repetition; they, at the end of the last sentence, being well applicable to all the former sentences."

So, in the case of *Thellusson v. Woodford*, 11 Ves. 112, where the testator, in declaring the duration of certain trusts, provides that they shall last "during the natural lives of my sons P. J. T., G. W. T., and C. T. 2d. And of my grandson J. T., son of my said son P. J. T. 3d. And of such other sons as my said son P. J. T., now has or may have. 4th. And of [240] such *issue as my grandson J. T., son of my said son P. J. T., may have. 5th. And of such issue as any other sons of my said son P. J. T., may have. 6th. And of such sons as my said sons G. W. T. and C. T. may have. 7th. And of such issue as such sons may have, as shall be living at the time of my decease, or born in due time afterwards."

It was argued that the words "or born in due time afterwards," could only relate to the seventh class immediately preceding them, and could not be held to refer to all the preceding classes. And it was well urged in support of this view, that the first and second classes and part of the third, treated of lives then in being, in respect to which the words "born in due time afterwards," could with no propriety relate. But it was nevertheless held by all the Judges of England and in the House of Lords, that the words referred to all the preceding classes, although it was admitted that such a construction tended to create a perpetuity, and was manifestly against the policy of the law.

And in the same case, reported in 4th Ves. 227, the Court say, "the adding the restriction after the enumeration of the last class, was not because it was intended to apply to that only, but in order to avoid the frequent repetition of it." And again: "I deny the rule that it is to be applied only to the last antecedent connected by the word 'and.' It is not even so in criminal cases."

So in the case of *The King v. Wilkes*, 4 Burr, 2527, where the

sentence was: "At the house known by the sign of the Three Suns, in Brook street, near Holborn, in the county of Middlesex." It was contended that the words "in the county of Middlesex," related to Holborn only, and not to Brook street. But Lord MANSFIELD held that they related to Brook street as well as to Holborn.

It is asked if the liability which Gorham had incurred, resulted from anything he had done for Dallas.

The appellants contend that inasmuch as there was a prior attachment to that of Dallas', the detention of the vessel from the true owner, could not have been for Dallas' benefit.

But we submit, in the first place, that the test of the defendant's liability on this bond, is not whether detaining the vessel should result to the benefit of Dallas. The expectation of such benefit may have induced Dallas to give the bond. But the question here is, what induced the sheriff to detain the vessel from Davidson? For that is the act for which he has incurred the liability. Clearly, the sheriff's inducement to this act was Dallas' request and the receipt of Dallas' bond. He detained the vessel because Dallas promised by his bond to protect him against liability for so doing. Dallas' promise was not that he and his sureties would protect the sheriff from such consequences, provided the detention should inure to Dallas' benefit. Had he *proposed such a contract, the sheriff [241] would have answered that he could not insure such a result—that the ultimate disposition of the vessel depended upon circumstances entirely beyond his (the sheriff's) control. That he had no power to decide who should have the vessel. This question it was the province of the Court to determine. That there was only one thing he could do, which was to keep the vessel from Davidson, and he would undertake to do that if Dallas would protect him against the consequences of doing so; but he could not undertake for anything beyond merely keeping the vessel from Davidson. And that he (Dallas) must judge before he gave the bond, whether detaining the vessel from Davidson would result to his (Dallas') benefit.

Was not this necessarily the contract between Dallas and the sheriff, even without reference to the terms of the instrument? Can it be other than this? Does not the law so define its meaning?

And Dallas did consider whether detaining the vessel from Davidson would inure to his benefit. He knew that if the vessel was delivered to Davidson there was an end of all chances to recover his debt from Meiggs.

We say that the acts of retention and sale were done at the request of Dallas, and for the benefit he expected to derive from them. That these acts of seizure, retention, and sale, are the acts of the sheriff at the instance, and as the agent, of all the attaching-creditors, is not only the doctrine of all the authorities, but is expressly admitted at p. 8, of the last brief of appellant's counsel. Judge HEYDENFELDT says: "The sheriff was the

agent of both attaching-creditors, performing but one act, that of seizin, detaining the property for the same period of time; by his act he unites all parties by whose direction, or in whose favor he makes the levy, in one trespass as effectually as if they were all present and assisting in the manucaption."

It has been argued, though, that the record of Davidson against Gorham, shows an admission of Gorham, that he took and retained the vessel under the attachment of Gilson, and not that of Dallas. This is not quite ingenuous in Mr. Dallas, when we remember that he framed Gorham's answer in which this pretended admission is found. That he, Dallas, was the real and Gorham only the nominal party to that suit, and that the statement is, therefore, not the admission of Gorham, but the allegation of Dallas himself.

But over and above all this, the question is one of law, and, as Judge HEYDENFELDT shows, when Dallas' counsel, in drawing Gorham's answer, stated that Gorham retained the vessel under Gilson's attachment; if they meant by that, solely for Gilson's benefit, they were mistaken in point of law. (See *Windle v. Freeman*, 11 Ad. & Ell. 549; *Goldschmidt v. Hamlet*, 6 Man. & Gr. 190.)

But in *Davidson v. Gorham* it was only necessary to [242] plead to *general denial in order to put the plaintiff to the proof of his title. For that suit could turn on no other question than that of title in the plaintiff. And by an examination of that record it will be seen that a general denial was pleaded, and that the decision went on the issue made by that plea. True, the defendant's counsel also justified under the attachment of Gilson. They apparently thought proper to set Gorham's official character on the record, and to do this one attachment was sufficient. The plaintiff in that case did not recover on the ground of any irregularity in the attachments. They never did and never could come in question. If Davidson had failed to make out his title, any attachment, however irregular, (or no attachment at all,) was sufficient to defeat him.

Succeeding on his title, no attachment against Meiggs, however regular, could prevail against him.

But the fact that that suit was defended by Dallas, must conclude him.

The sheriff was, then, necessarily the agent of all the attaching-creditors, and consequently of Dallas, in the retention of the property, and it was against liability arising from this forced agency that Dallas indemnified.

Then as to the measure of damages. We cannot be mistaken in asserting that the consequences of Gorham's act are not to be measured by the benefit which accrued thereby to Dallas. As we have shown before, Gorham could not, nor did he undertake to control or regulate that matter. The measure of damage must necessarily be the injury that accrued to Gorham in consequence of the act.

That was what the obligors undertook specifically to protect him against. Now, what was that injury? It was the liability which he might be brought under to Davidson. Where are we to seek for that liability and its extent? In the record of *Davidson v. Gorham*, where it was established. Dallas and his sureties undertook to bear the burden of that suit, to assume the result, whatever that might be. But will they do so if you allow any other measure to govern than the one established by that record? Nothing can relieve Gorham from that liability but its full payment. Dallas and his sureties did not limit their responsibility to the extent of Dallas' debt, nor to the amount for which the vessel might sell, at a forced and uncompleted sale. Had they proposed to so limit themselves, Gorham would have declined to retain the vessel. They bound themselves to furnish complete protection, commensurate with the injury which Gorham might be made to suffer, without reference to the amount of Dallas' debt, or any other extraneous fact. In other words, they undertook that Gorham should be in no worse condition after that suit of *Davidson v. Gorham* than he was before. But if the judgment in that suit is not to be the measure of recovery *here, how can Gorham be said to be in as good [243] condition after that suit as before? If you give here less than that record demands, will not Gorham still remain liable to Davidson for the balance; and under those circumstances, can the appellant's bond be said to have been kept? Then what does the record of that suit establish? That Gorham is liable for the sum of eighty-five thousand dollars, with legal interest from January, 1855, making in all, at the time of commencing this suit, a sum exceeding the penalty of this bond.

It is said that the verdict for one hundred thousand dollars is compounded of the injury resulting from the seizure and detention—whilst the obligation of Dallas is to indemnify against liabilities resulting from detention only. By detention is intended the converse of surrendering; the sheriff is to continue to keep, ignoring the claim of Davidson, and treating the property in every respect, as if no such demand had been made, and against the liability that such conduct may involve, he is to be protected. Such conduct involves the detention and sale. Nay, more—it involves the re-seizure, for, although the useless form is never absolutely reduced to practice, the law presumes that the property has been surrendered to the claim, and that upon the indemnifying bond being given, it is re-seized, or, as some of the authorities express it, the inchoate seizure is completed upon the execution of the bond, and this because it is intended to give the sheriff a protection for all the acts done at the request of the attaching-creditor for his benefit. (See *Winlle v. Freeman*, 11 Ad. & Ell. 549; *Goldschmidt v. Hamlet*, 6 Man. & Gr. 190.)

Suppose Gorham had actually paid the judgment in *Davidson v. Gorham*. When he turns round to recover on this bond, could not the obligors with as much reason plead, that he had not

suffered because Davidson may one of these days return him the money. Such a presumption is no more unreasonable than that Davidson may release him. The answer to all this is, that the law does not indulge in presumptions of this character. It presumes that where one incurs a debt or liability, or has a judgment entered against him, he will pay it. And for all the purposes of its operation, it assumes that payment, or its equivalent, follows obligation and liability to pay, as a necessary consequence.

On the whole case, we respectfully submit that the protection which the defendants below promised to Gorham as the consideration and inducement to his performing what they asked of him, will not be afforded, unless the judgment below is in all respects affirmed.

At the July Term, BURNETT, J., after stating the facts, delivered the opinion of the Court.

In this case the defendants submit:

[244] *1. That in the Meiggs loan, McPherson acted without authority from Dallas, who never ratified it, and that, therefore, said debt from Meiggs was never, in fact, owing to Dallas; and said suit was, therefore, not authorized under the power.

2. The power of attorney does not authorize the execution of the bond of indemnity for Dallas, and that his sureties, executing the bond as *his* bond, and the condition failing, are not bound.

3. There is no proof of damage within the recitals and condition of the bond, and therefore no breach, nor consequent damage, nor liability proved.

In reference to the first point made by the defendants, it seems that the twenty thousand dollars received by McPherson in the month of August, 1854, was remitted by Dallas for a *specified* purpose only. Dallas held subsequent mortgages upon certain real estate; and one Ricketson held a prior mortgage upon the same property. The object of Dallas was to protect himself by the purchase of this prior mortgage. The money remitted was intended to accomplish a given end, and was specially dedicated to that purpose. So far, then, as the agency of McPherson regarded this particular fund, it was special. Whatever may or may not have been his powers as to other funds, and other matters, his agency here was special. His agency being special, he could not exceed it. "The acts of a special agent do not bind the principal unless strictly within the authority conferred." (*Rossiter v. Rossiter*, 8 Wend. 494.)

The loan of a part of this money to Meiggs, when it was intended by Dallas for another and a different purpose, was without authority on the part of McPherson, and did not bind Dallas. It was not the debt of Dallas, unless he *afterwards* adopted and made it his by ratification. Dallas had the power to ratify the loan or not, at his pleasure. If he ratifies it, the debt then be-

comes a debt due from Meiggs to him. But until ratification, as the act was in the beginning without authority, it must be presumed that he would not ratify. So long as the debt remained without ratification it was in contemplation of law a debt due from Meiggs to McPherson. And in order to make a ratification binding, it was held by this Court in the case of *Billings v. Morrow*, (7 Cal. 171,) "that a principal, who ratifies the acts of his agent, must be made acquainted with the character of those acts, and unless all the circumstances are made known to him, the ratification is void."

The acts of an agent beyond his authority, are as the acts of a stranger; and before the principal can be bound he must know what has been done, so that he may advisedly exercise his own judgment upon the circumstances in the same way as if he had originally made the contract himself.

In this case it is clear that Dallas, at the time the bond was executed, could not have ratified this act of McPherson. Dallas resided in Scotland, and the loans to Meiggs [245] were made September 18, and October 3, 1854, and the indemnity-bond executed December 23, 1854. The time was so short that it would have been hardly possible to hear from Dallas before the date of the bond. And not only so, but the onus of proving a ratification by Dallas is thrown upon the plaintiff, who, in this case alleges the affirmative of the proposition. There is no proof of any ratification by any act of Dallas done after a full knowledge of the circumstances.

It would seem clear that McPherson, under the general power of attorney received by him October 25, 1854, could not ratify his own unauthorized act. As between himself and his principal, he could do no act that would affect Dallas. "A person cannot act as agent in buying for another goods belonging to himself." (Story on Agency, Sec. 9.)

Another position which seems to be clear and undoubted, is this: that the power of attorney received by McPherson, only authorized him to bring suits upon the contracts of Dallas. The debt from Meiggs being the debt of McPherson, he had no right to sue in the name of Dallas. However broad and general we may construe the language of the power to be, it will only embrace matters appertaining to Dallas.

In answer to these views, the learned counsel for the plaintiff insists that "any original want of authority is undoubtedly cured by the record of the suit of *Dallas v. Meiggs*," and they maintain that "judicial records for all the purposes for which they can be used, are absolutely conclusive of the facts which they assert."

In the case of *Field v. Gibbs and others*, (1 Pet. C. C. 157,) Judge WASHINGTON says: "The general rule of law, to which I know no exception, is, that nothing can be assigned for error; nor can any averment be admitted which contradicts a record." "A record," says Lord COKE, "imparts in itself such uncontrollable credit and verity, that it admits of no averment, plea, or

proof, to the contrary, for otherwise there would never be an end of the controversy."

In that case it was held, that in an action upon a judgment against Joel and Martin Gibbs, in which it appears that they defended the former suit by their attorney John P. Ripley, the defendant Martin Gibbs, was not allowed to plead; that the attorney had no authority to appear and plead for him, as the record was conclusive of the fact, whether true or not. So, in the case of *Smith v. Bowditch*, (7 Pick. 136,) it was held that the signature of the attorney was matter of record, and could not be disputed. And the Court said: "The defendant had no right to look to the record; and if the person whose name is there as attorney, acted without authority, and the plaintiff is thereby injured, the remedy is by an action for damages."

[246] *So, in the case of the *People v. Bradt*, (7 John. 539,) the same doctrine was laid down.

This is certainly a very stern and rigid rule, sometimes placing parties in the complete power of others, which nothing but the most imperious necessity could justify, and for that reason the rule should not be extended beyond the reasons of necessity and policy upon which it is based. It will be seen, that in the above cases, cited by counsel for plaintiff, the questions all come up between parties to the suit. And in his work on Evidence, Professor Greenleaf says: "But to prevent this rule from working injustice, it is held essential that its operation be mutual. Both the litigants must be alike concluded, or the proceedings cannot be set up as conclusive upon either." (Sec. 524.)

In the case of *Dallas v. Meiggs*, Gorham was not a party, and the record was not conclusive upon him, and cannot be conclusive as between him and Dallas. Conceding, for the sake of the argument, that McPherson had no authority to bring that suit, would the simple fact that he did nevertheless bring it in the name of Dallas, be conclusive upon Gorham as to the question of McPherson's authority? Suppose Gorham had refused the bond of indemnity, executed by McPherson, upon the ground that the alleged agent had no authority, could Dallas have held Gorham responsible? Could not the sheriff have shown that the bond was issued without the authority of Dallas, and, therefore, he, as sheriff, was not bound to receive it as the bond of plaintiff in that suit? It is apprehended that Gorham was not bound to recognize McPherson, as the agent of Dallas, from the simple fact alone that the record showed him to be such. The record could not then be conclusive upon parties and privies, except in some cases for specific purposes.

This view seems to be clearly laid down in Greenleaf on Evidence: "A record," he says, "may be admitted in evidence in favor of a stranger, against one of the parties, as containing a solemn admission, or judicial declaration, by such party in regard to a certain fact. But in that case, it is admitted, not as a judgment conclusively establishing the fact, but as the deliberate declaration of the party himself, that the fact was so. It is,

therefore, to be treated according to the principles governing admissions, to which class of evidence it properly belongs." (Sec. 527 *a*; see also, Sec. 538.)

And the rule upon this subject, is concisely and accurately stated by Lord Chief Justice De Gurr, in the *Duchess of Kingston's* case, "that the judgment of a Court of concurrent jurisdiction, directly upon the point is, as a plea, a bar, or as evidence, conclusive between the same parties, upon the same matter directly in question, in another Court."

But conceding the position to be true, that as between Dallas and McPherson, the loan of Meiggs, and the bringing of the suit, *was unauthorized by Dallas, a very important [247] inquiry arises, whether under the circumstances of this case, Dallas had not, by his own acts, placed McPherson in such a position as innocently to mislead Gorham as to the authority of the agent to bring the suit. It was certainly the duty of Gorham to use due diligence in ascertaining the facts, and to know the law. But if, after the use of such diligence, he was still unable to ascertain the facts relative to this particular fund, and was misled by reason of the conduct of Dallas, and his agent, then it is apprehended the injury should fall upon Dallas, who committed the error. It is true, that "it is the duty of persons dealing with an agent, to make inquiries as to the nature and extent of such authority and to examine it." (*Story on Agency*.)

What, then, had the sheriff to do? He had to ascertain two facts: 1. That McPherson had power to sue and execute bonds upon the contracts of Dallas: 2. That the suit brought, was upon a contract of Dallas.

Whether the first fact existed or not, could be ascertained by an inspection of the power of attorney. As to the second alleged fact, one of the learned counsel for the defendants insists that its truth could be ascertained by an "inspection of the note sued on, because this was a note payable to McPherson, and by him endorsed to Dallas, which the sheriff was bound to know the former had no right to do."

The truth of this position will depend upon the question, whether the notes, or either of them, as set forth in the complaint, in the case of *Dallas v. Meiggs*, were, upon their face, in legal effect, the property of McPherson, or of Dallas. As we have seen, one was payable to "McPherson, agent, or order," and the other to "McPherson, agent of A. G. Dallas, or order." It was clear upon the face of the notes, that the consideration for which they were given came from McPherson, in his capacity of agent, and did not move from him in his personal right. In one case it was clear that the consideration came from Dallas. In the other, it was not disclosed from whom the consideration flowed; but the fact that McPherson was but an agent, is seen on the face of the paper. The note payable to "McPherson, agent of A. G. Dallas, or order," upon its face, was the property of Dallas. (*Sayre v. Nichols*, 7 Cal.

535; Story on Agency, Sec. 160 a.) And the question as to whether McPherson had the right to endorse the other note to Dallas, depended upon the two facts, whether the consideration for which the note was given, flowed from Dallas or not, and whether the agent had a right to make the loan to Meiggs. If the money was the money of Dallas, and McPherson, *so far as Gorham had the means of knowing*, had authority to loan it to Meiggs, then McPherson had the right to endorse this note to

Dallas. Suppose that McPherson had the right in fact to [248] loan this particular fund, the note would *have been virtually, to say the least, the property of Dallas, and Dallas could not have made McPherson responsible to him for a conversion of the money; provided, McPherson would endorse the note to Dallas. Upon an endorsement of the note by the agent to the principal, the latter would have been in as good a condition as if the note had been taken payable directly to him in the first instance. This endorsement the agent had a right to make, at any time, with or without the consent of the principal, if we concede the authority to make the loan itself. The formal error of McPherson, in making the note payable to him, as agent, without disclosing the name of his principal, he had the right to cure by endorsement.

The question then arises, whether McPherson had the authority, not as between him and Dallas, but as between Dallas and the sheriff, to make the loan to Meiggs.

The testimony of McPherson, as set forth in the record, is the only evidence upon this point. It appears that the indemnity bond was executed at the sheriff's office in the presence of Brady, the clerk and deputy of Gorham. The witness then assured one of the sureties, Falkner, "that Mr. Dallas would protect him." "He, Falkner, put the question frequently, whether it was Mr. Dallas' bond. I told him that I was representing Mr. Dallas, and that he would protect him." It is clear that the representations made to Falkner were made in the presence of the deputy of Gorham. It also appears that Dallas had then a large property in this State, a house in San Francisco, mill property on the Albion Rancho, and mortgages to the amount of from thirty-five to forty thousand dollars. And the witness said, "I considered this as Dallas' debt, when the suit was brought. I had invested other money for Dallas before this."

It is not absolutely certain, from the testimony, as to whether McPherson or others had made these investments for Dallas, but from the facts stated by McPherson, taken in connection with the power of attorney, the conclusion is almost irresistible that McPherson had been the general agent of Dallas in making them.

From all the testimony of McPherson it appears that he had been the general agent of Dallas, in making investments and loans of money, that he received this particular fund for a particular purpose; but, that he could not at the time use it for the

purpose intended, and therefore made the loan in question; and that he did not disclose the fact to Gorham, or to his deputy, that he had received this particular fund for the special purpose intended, but that all his representations to the sheriff, as well as to the sureties, went to conceal that fact. Suppose the sureties upon the representations of the agent, and an inspection of the papers in the suit of *Dallas v. Meiggs*, and the power of attorney, (conceding for the present, that the power *itself was sufficient,) had executed the bond without Dallas, but for his benefit, and suppose they had paid the amount to the sheriff, could not they have their recourse upon Dallas? It would seem clear that they could. Dallas had first employed McPherson, as his agent, to make investments and loans, and then followed this up with a power of attorney, so general and comprehensive in its terms, as not to put others upon inquiry as to his particular instructions in reference to the special fund in question. No one, hearing the representations of McPherson, and knowing his general previous acts, as the agent of Dallas, and looking at the power of attorney, would have thought of inquiring as to this particular transaction. They would only inquire of the agent, "was this Dallas' debt?" That the agent answered in the affirmative, there would seem to be no question. And although there would seem to be no doubt as to the innocent intention of the agent, yet that could not affect the rights of the sheriff, or of the sureties.

If these views be correct, it follows that while, as between the agent and his principal, the loan to Meiggs was unauthorized, yet Dallas was bound by the act of his agent, for the reason that he placed McPherson in such a position as to mislead innocent parties. And from this it seems clear, that as between Dallas and the sheriff, the loan to Meiggs was authorized, and the debt due from Meiggs to Dallas. (Story on Agency, Sec. 443; 7 John. 390; 13 Wend. 518.)

We will now proceed to consider the second point made by the defendants.

"Formal instruments of this sort are ordinarily subjected to a strict interpretation, and the authority is never extended beyond that, which is given in terms, or which is necessary and proper for carrying the authority so given into full effect." (Story on Agency, Sec. 68.)

In this case it must also be assumed that as Dallas made the power of attorney to be executed in this State, he did so with a full knowledge of the law as it existed here at the time. (Id. Sec. 86.)

The learned counsel for the defendants insist "that the power to execute deeds must be confirmed to the last antecedents, to arbitrate, compromise, or amicably settle," which construction is assisted by the fact that deeds are technically proper, as matters of law for those purposes, and are inapplicable in law to the antecedent powers to sue, collect and recover." This construction is disputed by the learned counsel for the plaintiff, who insist

that the power to execute deeds, applies as well to the power to "sue," as to the power to "arbitrate." In the printed brief of the plaintiff, there is a mistake in the punctuation, in putting a semicolon after the words "United States," instead of a [250] comma; *and upon this mistake a portion of their argument is predicated.

It will be seen upon inspection, that there are four clauses in the power of attorney, in each of which separate and distinct specified powers are given: 1, To take possession of property; 2, To recover debts; 3, To arbitrate all questions; 4, To sell real and personal property. These clauses are separated from each other by a semicolon, while the only point used within each clause is a comma.

It would seem, at first view, that it was the aim of the person who drew the power of attorney to separate the subjects of the power into four distinct classes; to include one class in each separate clause; and also to specify within each clause the means intended to be stated to carry out the powers conferred in the clause itself. And this view is strengthened by the fact that the word "deed" is mentioned in two different clauses, which would have been unnecessary had the word as used in the third or fourth clause been intended to apply to all the precedent powers.

But this view seems to be entirely rebutted by the language of the fourth clause of the power of attorney, which seems not to have been observed by the counsel on either side. The language is this: "and to grant all necessary deeds and acquittances to carry these powers into full effect." The power conferred by the fourth clause is the power to "sell and dispose of said real and personal estate." The power to "sell or dispose of," is substantially the same, and the terms "these powers," must also refer to powers granted in other clauses. This view is confirmed by the use of the word "acquittances" in the fourth clause, which could properly have no application to the power to sell, but must refer to the power to sue and compromise conferred in the second and third clauses. If the word "acquittances" refers to all the powers previously mentioned, and to which, in its nature, it could properly apply, then the word "deeds," connected with it, would equally apply to all the preceding powers, in all cases to which it was necessary as a means to carry them out.

If these views be correct, it was the intention of Dallas to confer upon his attorney the power to execute deeds and other instruments in all the cases previously mentioned, where they were "necessary to carry these powers into full effect." And we think this view so clear that we deem it unnecessary to cite the authorities referred to. We may remark, however, that after a careful examination of them, we do not find them applicable under the view we have taken.

The question then arises, whether the power to execute the bond of indemnity was a "necessary means" of executing the

power to sue with "full effect." And to answer this question correctly, we must remember that Dallas intended the power to *be executed within this State, and made it with [251] a view to the law as it then existed. It is substantially conceded by the counsel for the defendants, that "the execution of an attachment-bond would be within the power to sue," upon the ground that it is "an inherent element of the case, which a principal would contemplate in every case coming within the requirements of the attachment law."

There would seem to be no doubt as to the correctness of this position. It has been held that the power "to recover and receive a debt will authorize the attorney to arrest the debtor." (Story on Agency, Sec. 58.)

If then, the attorney of Dallas had authority to execute an undertaking in an attachment-suit, had he not equal authority to execute an indemnity-bond, under proper circumstances? In this case, the property had been attached, and a third party claimed it. This presented a case in which an indemnity-bond would be proper, under the laws of this State. As to the question whether the property would ultimately turn out to be the property of Davidson, it was the right of the agent to determine, conceding that he had the power to execute such a bond in *any case*. So far as the sheriff was concerned, the suit had been properly brought; and when the property attached was claimed by Davidson, the agent had to determine whether he would at once give up the levy and lose the debt, or whether he would take a trial before a sheriff's jury, or indemnify the officer without such trial. And if he had a right to determine the propriety of indemnifying the sheriff *after* a verdict of the jury in favor of the claimant, he had equally the right to waive that trial, and thereby avoid the risk of the costs necessarily to be incurred. As McPherson had the right to decide as to the *expediency* of issuing an attachment in an attachment case, so he had the same right to determine the expediency of executing the indemnity-bond. The same discretion was reposed in him in reference to both cases, if reposed in him at all.

It must be conceded, that a greater risk is ordinarily incurred in case of indemnity than in the case of attachment. But it must also be conceded that both are equally necessary in proper cases. And whether an indemnity-bond be a necessary means to collect a debt in the particular case—who shall determine, the agent or the sheriff? There are many means usual and necessary to accomplish the same end. Under one set of circumstances, one means may be necessary and another not. An indemnity-bond, under our system, is a necessary means, in a certain state of case. The agent must determine for his principal, and not the sheriff, as to whether it is expedient in a case where allowed by law. When the property attached is claimed by a third party, it presents a case proper for indemnity, and in *such a case an indemnity-bond is an ordinary [252] and necessary means under our system of practice.

From these views, it follows that McPherson, so far as the sheriff and sureties are concerned, had authority to execute the indemnity-bond for Dallas.

We proceed now to the third and last point made by the defendants. In considering this point, it must be conceded that the plaintiff can only claim what Gorham could claim had he brought this suit.

In the case of *Jones v. Atherton*, (7 Taunt., 56,) cited by the counsel of plaintiff, it was held that "if a second *feri facias* be delivered to a sheriff after he has the defendant's goods in possession under the prior *feri facias* of another, the goods are bound by the second execution, subject to the first execution." And in the case of *Goldschmidt v. Hamlet*, (6 Man. & G. 187,) also cited by them, it was decided, that where A. and B. issued separate executions, and both were levied upon the same property at different times, and the prior execution of A. was set aside, B. was entitled to be paid as if he had been the sole execution creditor. And in the case of *Winle v. Freeman*, (11 Ad. & Ell. 539,) it was settled that when a second execution was levied upon certain goods, and the proceeds were afterward exhausted by the first execution, the sheriff's return of *nulla bona* upon the second execution was proper.

It would seem that these cases lay down the correct doctrine, and the only question that can arise, is in reference to the application of the principles settled, to the facts of the present case.

It appears that Gorham had first levied the attachment in the case of *Gilson v. Meiggs*, and afterwards levied the writ in the case of Dallas, upon the same property. He also took a separate bond of indemnity from both Gilson and Dallas, each for the full value of the property attached. As the property could not be divided, he was compelled to seize and detain it entire, under both attachments. The seizure under Gilson's attachment being prior in point of time, was absolute, and that under Dallas' attachment, being subsequent, was *subject to the first*. As the sheriff could not foresee whose levy would ultimately prevail, it was his right and his duty to take full indemnity from each, so that he would be secure in any event.

As between Davidson and the sheriff, it was a matter of indifference to the former, under what authority the "Underwriter" was taken. It was not the business of Davidson to inquire. But as between the sheriff and those for whom he acted, the question assumes a very different shape. As between him and them it was a matter of contract. In making these contracts each party must be held to have known the law; and the terms of the law therefore enter into and form a part of them [253] without *any express stipulation to that effect. The parties must also be held to have contracted with a knowledge of the facts so far as they were shown by the proceedings.

In detaining the vessel under each attachment, the sheriff

acted as the agent of both Gilson and Dallas; but his agency for Gilson was *primary*; while it was *secondary* for Dallas. It was conditional as to both. If the sheriff ultimately incurred no liability, he could recover nothing. And if he did incur liability, must he not recover in the order in which he levied? And of each plaintiff, in proportion to the liability ultimately incurred *for him*? The ultimate liability of the indemnitors was not fixed by the execution of the bonds, but depended upon subsequent events; and as both the fact of liability at all, and also its amount, were dependent upon subsequent events, why should not the fact, as to which plaintiff should be liable, and in what proportion, and in what order, be equally dependent upon the result of the proceedings in the two attachment-suits? If the sheriff did his duty in taking full indemnity from each creditor, (and if he did not, it was his own error,) then he was protected in any event. If the attachment of Gilson was defeated, and that of Dallas sustained, then Dallas would be held as the *sole* attaching-creditor, under the authority of one of the cases before cited, and be subject to the ultimate sole liability.

It is true, Gorham detained the whole vessel for Dallas, but he detained it subject to the prior attachment of Gilson. The vessel could not be divided, and the detention of the sheriff for each creditor was in the order mentioned, and the liability to him for this detention must be in the same order. If this order be subject to be changed or disturbed by the result of the suits; then the order of liability is equally subject to the same contingency. And so in reference to the proportion of damages for which each party may become liable.

It is conceded, that in a case of a *joint* trespass, the *party injured* may sue one or all of the trespassers, and each one will be liable for the whole damages, but a satisfaction made by any one of them, will be a discharge of all. But in this case, as between the sheriff and his indemnitors, the same rule cannot apply. He does not bear towards them the same relation that the injured party does towards joint trespassers. As between Gorham and the attaching creditors, their liability to him arises under contracts allowed by law. In these contracts, there were mutual covenants. He bound himself to detain the property, first, for Gilson, and second, for Dallas, with the condition that this order was subject to be changed by the ultimate result of the suits.

From the principles of the cases referred to, and the provisions of our Practice Act, these conclusions would seem to follow:

1. If the attachments were ultimately sustained, and the whole proceeds of the property absorbed by the debt of Gilson, then *he would have been solely responsible to the sheriff [254] for the entire liability incurred by him to Davidson.
2. If the levy of Gilson had been defeated, and that of Dallas sustained, then Dallas would have been solely responsible for the entire amount.

3. If both attachments had been sustained, and the property sold for more than sufficient to pay Gilson, then Gilson and Dallas would have been responsible in proportion to the amounts paid to each by the sheriff.

4. If both the attachments had been defeated by Meiggs, or if the suits of Gorham against the indemnitors had been commenced before the determination of the attachment-suits against Meiggs, then the separate responsibility of Gilson and Dallas, would have been in proportion to the amounts of their respective attachments, except in case the whole amount for which both attachments were levied, had exceeded the value of the property as settled in the suit against the sheriff, in which case the prior attaching-creditor would have been responsible to the amount of his attachment, and the subsequent attaching-creditor for the remainder. For example, if the first creditor attach for ten thousand dollars, the second, for twenty thousand, and the value of the property be twenty thousand, they would each be responsible to the sheriff for ten thousand dollars. Upon the rendition of the judgment against the sheriff, the title of the property vests in him for the several indemnitors, who have each an interest in proportion to their respective liability to the sheriff. As the attaching-creditors had obtained no judgment against the debtor at the time, they should each relinquish his levy upon the property. The debtor has no right to ask that the property should be sold, and the proceeds appropriated to his debt. The property never having been his, he has no right to the proceeds.

In opposition to this view of the case, it is insisted that, "A Court of Law cannot apportion the amount of recovery between Gilson and Dallas." But this objection does not seem to be well founded. That the sheriff is entitled to full indemnity is conceded; but what proportion he shall recover from one, and what from the other, is a matter that affects the *quantum* of damages in each case only. It is conceded by the counsel for plaintiff, that a satisfaction of the bond of Gilson would discharge Dallas. In other words, Gorham could not collect the full amount from each party. If a full payment by Gilson would discharge Dallas, then a partial payment by Gilson would be *pro tanto* a discharge of Dallas. And if partial payments made by Gilson could be proven by Dallas, to lessen his responsibility, it is not perceived why he could not be permitted to show either the entire or partial separate responsibility of Gilson to Gorham, in order to produce the same result. It would seem to be as easy for a Court of Law to ascertain the [255] proportionate liability of each indemnitor, as to ascertain the partial payments made by each. The criterion which settles the proportionate responsibility of Gilson and Dallas is found in the records of the two cases, and the practical application of it, is a matter of calculation readily made.

The theory of the plaintiff, in substance, is this: Gorham had a right to demand a separate indemnity from Gilson and Dal-

las, for the full value of the property, and, in the event of his becoming liable to Davidson, he could sue either of them, at his election, and recover from the party sued the entire amount of his liability to Davidson, if within the penalty of the bond, and this without any regard to the rights of Gilson and Dallas, as between themselves. But this theory would seem to be incorrect, and to lead to very unjust results. The legal effect of a judgment for the full value of property converted by a party, operates as a change of the title, which at once vests in the defendant. (2 Tucker's Com. 90; Starkie, 1281, 1507.)

As Gorham took the property for Gilson and Dallas, the property vested in him for their benefit. The law gave Gorham the property for the judgment, and if he relied upon the indemnity-bonds, in the place of the property, he should look to the party who received the proceeds. As Gorham first took the property for Gilson, and afterwards disposed of it for him, he should look to Gilson, and not to Dallas. He was the separate agent for both parties, but in the order stated; and, as he disposed of the property for only one, he should look to him alone. And it is no answer to this view, that the disposition of the property made by Gorham was not voluntary on his part, but was compelled by the law. The law afforded him ample protection. If he did his duty, he had full indemnity from each party, and any disposition the law might make of the property would not, in the contemplation of the view we have taken, materially injure him. His remedy, upon the bond of the proper party, was ample. It mattered not to him which party was made liable. His rights were equally protected in either case, because he had taken good bonds in both, If not, it was his own error.

If we take the theory of the plaintiff to be correct, for the sake of the argument, it would certainly place a subsequent attachment or execution-creditor in a very perilous condition. We will take the facts of this case as an illustration. The debt of Dallas was twelve thousand five hundred and forty-two dollars, and Gilson's of thirty-five thousand dollars. The property was claimed by Davidson, and could not be divided. Dallas was compelled to indemnify, or give up the lien of his attachment. If he indemnified, he incurred a risk to the amount of one hundred thousand dollars, for the chances of making twelve thousand five hundred and forty-two dollars. As Gorham had the *right to sue either Gilson or Dallas for the en- [256] tire amount, Dallas was at the caprice of the sheriff, whose motive for suing him in preference to Gilson, he could not inquire into. Under such a theory, would any prudent subsequent creditor ever think of giving an indemnity-bond?

This brings us to consider the effect of the agreement between Gilson and Dallas. In that agreement, it was stipulated in substance, that if the decision should be that the vessel was the property of Meiggs, and it should not sell for a sufficient amount to satisfy both demands, that then the proceeds should be di-

vided in proportion to the debts. But in case the decision was adverse to them, then they were to pay the necessary expenses in the same proportion. There is nothing in the agreement that gives any part of the proceeds of the vessel to Dallas, in the event that it was decided to be the property of Davidson. In reference to that matter the agreement is silent and leaves the parties to rest upon their legal rights, as if no agreement had been made. The event contemplated by them, and to which the agreement refers, did not happen.

This view disposes of the case without the necessity of deciding several other points mentioned in the briefs of counsel.

The judgment of the Court below should be reversed, a new trial ordered, and the cause remanded for further proceedings.

MURRAY, C. J.—I concur in the judgment.

A rehearing having been prayed for at this term, BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

This case was decided at the present term, and a petition filed by plaintiff for a rehearing. The importance of the case renders it proper that some additional reasons should be given.

The learned counsel for the plaintiff, in their petition for a rehearing, have referred us to the case of *Walmaugh v. Francis*, 7 Penn. St. 206, as an authority against the position we have taken. The facts of that case were substantially and concisely these: Baldwin had a prior and Francis a subsequent execution against Norris. Both executions were levied upon certain property which was claimed by Thompson. Baldwin did not indemnify the sheriff, but Francis did. The sheriff proceeded and sold the property under both executions, and paid over the entire proceeds to Baldwin. Thompson sued the sheriff and obtained judgment against him, for the value of the property, and then the sheriff sued Francis upon his bond, and it was held by the Supreme Court of Pennsylvania, that the sheriff could recover.

The statutes of that State contain a provision regarding indemnity-bonds given to sheriffs. (Laws of Pennsylvania, from 1700 to 1849, by Dunlap.) But, according to the practice in that

[257] State, when properly attached, or levied upon, by an officer, is *claimed by a third party, the Court, upon application, will enlarge the time for making the return. In the opinion of the Court, ROGERS, J., holds this language:

“As he is bound to execute the writ at his peril, where there is reasonable doubt whether the goods are liable to be taken on the *fi. fa.*, he may apply to the Court from which the writ issues, and in a proper case, the Court will enlarge the time for making the return to the writ until the right be tried, or a sufficient indemnity be given. But when he has received or tendered an indemnity, it is his duty to proceed, on the pain of being attached or fixed for the debt.”

From this, it seems clear, that where indemnity is offered the officer must proceed, but when it is not offered, he cannot relinquish the levy except at his peril, but may apply to the Court to enlarge the time for making the return, "until the right be tried, or until sufficient indemnity be given."

In reference to another point, the same learned Judge proceeds to say:

"Under the circumstances in which he was placed, what was the sheriff to do? On the tender of indemnity, he was bound to execute the writ; so say all the authorities. It is also clear, that the Court will not stay the proceedings on the allegation, simply, that he has another execution in his hands against which he is not indemnified. The answer to such an allegation would be, that is nothing to you—you have a sufficient bond of indemnity, and it matters not by whom it is given, whether by the first or second execution-creditor. You are not entitled to two indemnities. You cannot execute one writ without executing the other; the levy and sale on one, is the levy and sale on both."

It will be seen upon a careful examination of the able opinion of Mr. Justice ROGERS, that the decision was mainly predicated upon the grounds indicated in the extracts given. As the sheriff could not relinquish the levy, except at his peril, there was no necessity for Francis to indemnify. If Francis, as well as Baldwin, had refused to indemnify the sheriff, then the latter would have applied to the Court, and then the right to the property would have been tried, and the same question finally settled, that was afterwards settled in the case of Thompson against the sheriff. Under such a practice, no risk was necessary on the part of either execution-creditor. But as Francis chose voluntarily to incur the risk, when unnecessary, he was held to incur for the other execution, as well as for his own; and the sheriff was only allowed to take one indemnity; and as he was allowed to take but one bond, he was allowed to recover on that. And the whole theory of that opinion substantially rests upon these grounds:

1. That the creditors were not bound to incur any risk.

*2. That if they did so voluntarily, the sheriff could take [258] but one bond of indemnity.

3. That if the bond was given, the sheriff must proceed upon all the executions.

But the provisions of the one hundred and thirty-first and two hundred and eighteenth sections of our Practice Act, have most materially changed the rule upon this subject. Under our system, if the property be claimed by a third person, the sheriff may protect himself by a trial before a jury of six; and if the verdict be in favor of the claimant, the sheriff may relinquish the levy unless indemnified. Here the creditor is either compelled to abide the verdict of a sheriff's jury, or he must give the indemnity. He cannot, as in Pennsylvania, have a regular and final trial before a competent Court, without risk, but he must

either submit to the decision of six men, unaided by the instructions of a competent Court, or lose his debt. And the hardship of the creditor would be increased beyond endurance, if we hold that the sheriff could take but one indemnity bond, and that such indemnity, when given, either by the prior or subsequent creditor, would inure to the benefit of all the writs that might come into the hands of the officer, and be levied upon the same property. For, as I understand the principle settled in that case, if Baldwin had given the indemnity instead of Francis, then the sheriff would have been still competent to proceed under both executions; and if the proceeds had been more than sufficient to satisfy Baldwin's execution, then the surplus would have been applied to the execution of Francis. And if there had been several other subsequent executions, and the property had brought enough to have satisfied them, in whole or in part, the result would have been the same. The indemnifying creditor, whether first, intermediate, or last, took all the responsibility, and all the others shared the benefit of his indemnity in the order of the priority of their several executions.

But it cannot be so under our statute. If Gilson had refused to indemnify, and Dallas had done so, then the sheriff should have released the levy of Gilson, and Dallas would have shared all the responsibility and all the benefit.

And the same rule would apply to any subsequent creditor who refused to indemnify. The object of the statute is to make responsibility and benefit go together. And this being true, it is apprehended that there can be no other theory but the one we have adopted, that will legitimately carry out this intent of the statute, and do equal and exact justice to all parties.

It is only upon the ground that our statute makes responsibility and benefit go together, that Gorham had the right to take separate bonds, (each for the full value of the property,) both from Gilson and Dallas. If the protection of the sheriff

had been the sole object, without regard to the rights of [259] each *creditors, as between themselves, then only one bond could have been taken.

The protection of the sheriff would have been amply secured by one, and there could have been no necessity for more. But as each creditor was compelled to indemnify, or relinquish his levy, the sheriff had the right to take separate bonds from each. And the object of these separate bonds was to protect the rights of the indemnitors, as between themselves. And while it was the object of the statute to give the sheriff protection, it was also its object to give the creditors a fair opportunity to assert their rights, without placing them in such a position as to force them, either to lose their debts, or to incur extraordinary risks, entirely disproportionate to the necessities of the case.

If the theory we have adopted be fairly carried out, and practically applied, it will be found to afford the sheriff ample protection, and yet, at the same time, not do injustice to creditors.

It will not place the creditor in such a position that he must choose between two severe alternatives.

It is impossible, within the limits of an opinion, to anticipate and answer all the objections and misconceptions of counsel. But I apprehend that, upon a careful examination of the former opinion in this case, it will be found perfectly consistent with itself, and that no such consequences legitimately flow from it, as has been supposed by counsel. The four cases mentioned, are all based upon the same principle, and are entirely consistent with each other. The principles laid down in these four points, it is conceived, will include every case that can arise. The language of the fourth point may be made more full, by saying "defeated or dismissed," in place of "defeated by Meiggs."

In the opinion, we said that "in detaining the vessel under each attachment, the sheriff acted as the agent of both Gilson and Dallas, but his agency for Gilson was primary, while it was secondary for Dallas. It was conditional as to both."

What was meant by the expressions primary and secondary, would seem to be sufficiently explained in the opinion itself.

As to the sentence, "it was conditional as to both." Where an officer attaches the property of the defendant, he does not act as the agent of the plaintiff, but as the officer of the law. But when he attaches property that does not belong to the defendant, he goes beyond the command of the writ, and acts as the agent of the party at whose instance he does the act. As it was unknown whether the Underwriter was the property of Meiggs, or not, the sheriff's agency at that time was but conditional, and depended upon the result of subsequent proceedings. If it turned out to be the property of Davidson, then the sheriff acted as the agent of Gilson and Dallas; if otherwise, he detained the property as the officer of the law.

*After the most careful consideration of the subject, I [260] can see no sufficient reason for changing the former opinion.

Petition denied.

PAYNE v. BENSLEY.

¹ **NEGOTIABLE INSTRUMENT AS SECURITY FOR DEBT.**—Where a negotiable promissory note, not yet due, is taken *bona fide*, as collateral security for a pre-existing debt, it is not subject to any defense existing at the date of the assignment between the original parties.

PLEDGE, WHEN A MORTGAGE.—A pledge of personal property is a "mortgage," within the meaning of the Attachment Act; the word, being there used in its most general signification, meaning "security."

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

Theodore Payne, as plaintiff, brought this action in the Court

1. Approved, *Robinson v. Smith*, 14 Cal. 98; *Naglee v. Lyman*, 14 Cal. 454. Cited *Frey v. Clifford*, 44 Cal. 342; *Manning v. McClure*, 36 Ill. 495; *Shufeldt v. Pease*, 16 Wis. 662.

below, against John Bensley, on his promissory note, made payable to one Atwill, and by Atwill assigned to him. The defendant answered, admitting the execution and delivery of the note, but averred that the same was part of the purchase-money of a certain lot sold by Atwill to defendant, and that by a contract of even date with the note, Atwill agreed with the defendant, in case that the title of said lot failed, and defendant was evicted therefrom by due process of law, that then said note should be canceled. Defendant further averred that upon the maturity of said note, and prior to its assignment to plaintiff, that the title to said lot had wholly failed, and that he had been duly ousted from the possession thereof, by title paramount. The case was tried by the Court below, without the intervention of a jury, at which trial it appeared that the contract set forth by defendant in his answer, had been made between Atwill and Bensley; that the title of Bensley had been defeated, and that he had been evicted from the premises by title paramount; that before the promissory note became due, the same was duly endorsed to plaintiff, who received the same in good faith, without any notice of the contract between Atwill and defendant.

That the said promissory note was transferred by the said Atwill to the plaintiff as a collateral security, to be applied when collected by the plaintiff, towards the payment of a pre-existing debt of about the sum of five thousand dollars, owing from said Atwill to said plaintiff, for which plaintiff held Atwill's promissory note, and that said debt, owing from Atwill to the plaintiff, was not extinguished by such transfer of the defendants promissory note. Nor was any express agreement made between plaintiff and Atwill to extend the time of payment, and [261] that *there was no new consideration, whatsoever, for said transfer, unless the above facts constitute a new consideration.

On these facts the Court below rendered judgment for plaintiff, from which defendant appealed.

B. S. Brooks and William Duer, for Appellant.

The only point presented to the Court for adjudication in this case, is this:

Whether a promissory note without consideration, and upon which the payee could not maintain an action against the maker, is divested of its equities in the hands of the endorsee who receives it as a collateral security for an old debt merely, and parts with no value or new consideration when he receives it, and makes no new contract on the faith of it.

I had supposed the question settled beyond controversy, that such an endorsee was not a *bona fide* holder for value within the meaning of the term, as it is used in this connection, in the numerous reported cases. I was aware that Judge STORX, in the case of *Swift v. Tyson*, (16 Pet. 1,) had expressed an opinion to the contrary, which was *obiter dictum*, and Judge CATRON rebuked

it at the time as deciding a matter entirely outside of the case, and which had not been mentioned in the argument. But as this opinion had been expressly dissented from by every tribunal which had subsequently examined it, I supposed that the steady current of authority, which this opinion had for a moment disturbed, was permanently restored to its old channel. But the learned judge of the Twelfth Judicial District, who tried this case, having expressed himself otherwise, and so decided for the plaintiff in this suit, I beg the favor of a patient hearing from the Court, while I re-examine the question.

The note sued upon in this case was made by John Bensley, in favor of Joseph F. Atwell, for four thousand dollars, with interest, payable in three years, and was given in part payment for land purchased at the same time. By a cotemporaneous contract, in writing, this note was to be void in case Bensley, prior to the maturity of said note, should be ejected from the land by due process of law, under superior title. He was so ejected; and it is not disputed that Atwell could not sue upon the note. Atwell being insolvent, and indebted to Payne in five thousand dollars, endorsed the note over to Payne, who received it in good faith and without notice, and as collateral security for said pre-existing debt. The time of payment was not extended; there was no new consideration given by plaintiff for the note, and the original debt was not extinguished.

As long ago as 3 W. and M., A. D. 1692, *Clark v. Mundall*, 1 Salk. 124, S. C.; 3 Salk. 68, it was decided that a bill of exchange (or note) received, is not payment of a precedent debt, unless it is so expressly agreed. This has been the uniform rule *since that time in England and in the United [262] States, with the exception of some of the New England States, where a note or bill is payment and extinguishes the precedent debt. This is a material distinction, controlling the decisions in some cases.

Before the statute of 3 and 4 Ann. (c. 9, 1705,) an action would not lie upon a promissory note or inland bill. (*Clark v. Martin*, 1 Salk. 129, S. C.; 2 Ld. Ray. 757; *Pollett v. Pearson*, 1 Salk. 129; 2 Ld. 759; and in *Hodges v. Stewart*, 1 Salk. 124; 3 W. and M. 1692, it was held that an endorsee could not maintain an action against the drawer of a bill payable to bearer. (*S. P. Nicholson v. Smith*, 3 Salk. 67, S. C.; 1 Ld. Ray. 180; *Jordan v. Barloe*, 3 Salk. 67.)

A. D. 1690: in *Hilton's case*, 2 Show. 235, case on a bill of exchange against the drawer, (bill not being paid, and payable to J. S., or the bearer,) the plaintiff brings the action as bearer, and upon evidence, it was ruled by Lord PEMBERTON, that he must entitle himself to it, on a valuable consideration; for if he comes to the bearer by casualty or knavery, he shall not have the benefit of it.

A. D. 1699: Anonymous, 10 Wil. 3; 1 Salk. 126, S. C.; 3 Salk. 71; 1 Ld. Ray. 738. A bank-bill payable to A. or bearer, being given to A. and lost, was found by a stranger who transferred

it to C., for a valuable consideration; C. took it to the bank and got a new bill in his own name; *et per* HOLT, C. J., A. may have trover against the stranger who found the bill, for he had no title, though the payment to him would have indemnified the bank; but A. cannot maintain trover against C. by reason of the course of trade, which creates a property in the assignee or bearer.

A. D. 1764: *Grant v. Vaughan*, 3 Burr. 1716, S. C.; 1 Black. 485. Defendant drew his check upon his banker, Sir Charles Asgill, payable to ship *Fortune* or bearer, and gave it to W. Becknell, who lost it, and the finder, or one who had possession four days after it was due, came to the shop of the plaintiff, bought five pounds worth of tea of him, and gave him this check in payment, desiring to have the change out of it. Plaintiff went out and made inquiry, as to the drawer, ascertained that it was good, and the signature genuine, and took it in payment, giving the change. Upon presenting the check at the bank, payment was refused, it having been stopped by the drawer; and this action was brought in *assumpsit*, to recover the amount, and the plaintiff had judgment. Here was value parted with at the time, on the faith of the check.

1765: *Pillars v. Van Mierop*, 3 Doug. 1463, was a question of parol acceptance of a bill of exchange, and is not in point. But it is one of the cases cited by STORR, and I shall examine it fully in another part of my argument.

1776: *De Silva v. Fuller*, Sitt. Lond. Easter mss., [263] cited E. N. *P. 40, was an action in trover for a check drawn by one Cox, on the defendants, who were bankers, payable to No. 437 or bearer, on demand. It was drawn the 17th of June, but dated the 18th. Plaintiff received it on the 17th, lost it the same day, and on the same day it was presented by the finder to the defendants, who paid it. It was proved to be contrary to the usual course of business to pay checks before the day on which they were dated, and on that ground the plaintiff had a verdict.

1780: *Russell v. Langstaff*, Doug. 514, blanks for notes were endorsed by the defendants, afterwards filled up in divers amounts and signed by A, and discounted by the plaintiff for him. Plaintiff recovered judgment. Here was a good consideration, but the case did not turn upon that.

1781: *Peacock v. Rhodes*, Doug. 613, the action was upon an inland bill of exchange with a blank endorsement. It was drawn to the order of William Ingraham, by him endorsed in blank, and lost. The plaintiff took it from a man named Brown, in payment of goods sold to him at the time, giving him the change in cash and small bills. The only question argued in this case was, whether the rule applied to a bill drawn to order and endorsed in blank, whether it stood upon the same footing as a note payable to bearer; and it was here first decided that it did. But upon the question of *mala fides*, Lord MANSFIELD considered that the circumstances that the buyer and also the

drawer were strangers to the plaintiff, and that he took the bill of goods on which he had a profit, were grounds of suspicion, and so put it to the jury.

A. D. 1811: *Rees v. Marquis of Headport*, 2 Camp. N. P. 374, was an action on a bill of exchange against the acceptor. The bill was shown to be without consideration, and this was held to put the holder upon proof that he parted with value on the faith of it; and he not making such proof was nonsuited. And it was held, in the case of *Duncan v. Scott*, 1. Camp. N. P. Rep. 100, (A. D. 1807,) that where the consideration of the bill was impeached, the plaintiff must prove that he paid value for it, though he took it in good faith. (Per Lord ELLENBOROUGH.)

A. D. 1812: *Carstairs v. Bates*. Action by plaintiffs, assignees of a bankrupt banker, to recover from Bates, the acceptor of a bill of exchange drawn by one Allport, and discounted for him by the bankers, and proceeds carried to his account. The assignees recovered, though there was no balance due from Allport to the banker.

A. D. 1814: In the case of *Bosanquet v. Dudman*, 1 Stark, 1 Lord ELLENBOROUGH held *at nisi prius* that where a banker's acceptance exceeded the cash balance in his hands, he holds collateral securities for value.

1820: The case of *De la Chaumette v. The Bank of England*, *9 Barn. & C. 205, appears to me to be directly [264] in point, and decisive of the question, so far as the law in England is concerned. It is in many respects similar to the case of *Solomans v. The Bank of England*, before cited. In this case, a Bank of England note, which had been stolen in England in February, 1826, was remitted in May, 1827, by a foreign merchant to his correspondent in this country, to whom he was indebted in a sum exceeding the amount of the note. The latter demanded payment; the Bank of England refused to pay, on the ground that the note had been stolen. At the time when the correspondent was informed of this, he had not made the foreign merchant any advance on the credit of the note.

Here, the Court will perceive, is precisely the distinction. De la Chaumette was the holder of a precedent debt, exceeding the amount of the note, but he had not made any advance on the credit of the note. And it was held:

First, That in trover for said note, the plaintiff must be considered the agent of the foreign merchant, and that he could therefore recover on his title only.

Second, That in such action, it having been proved that the note had been stolen, it was incumbent on the plaintiff to show that the foreign merchant had given full value for it.

And note that in this case the jury found specially that plaintiff's correspondent received the note in the regular course of business. Scarlett & Platt, arguing for plaintiff, put his claim on the ground of the debt due from Odier & Co., to him; and it was replied, "That although they were indebted to him at the time when the note was remitted, he did not advance to them

any money on the faith of this note," and this argument prevailed.

And TENTERDEN, C. J., says: "It appeared that at the time when the note was remitted to the plaintiff, the balance as between him and Odier & Co., was £1,700 in favor of the plaintiff. But he did not, in consequence of having received the note, make any further credit to Odier & Co., than he would have done if the note had not been transmitted. We think, upon the whole, there should be a new trial, to give the plaintiff an opportunity of proving that Odier & Co. gave full value for the note."

As early as 1802, *Conny v. Warren*, 3 Johns. Cas. 260, the Court of Errors laid down the doctrine, that when the consideration of a note was impeached, the onus was on the plaintiff, to prove a consideration paid. In *Baker v. Arnold*, 3 N. Y. Term Rep., the litigation was upon the question of consideration, both of the note and assignment. The holder recovered a verdict. The only evidence impeaching either, was the testimony of one witness, who was discredited. He swore that the note was originally without consideration, or fraudulent, and the consideration of the endorsement was a pre-existing debt. But the jury disbelieved him, and all the judges agreed that they had a [265] *right to disbelieve him, and therefore refused a new trial. In *Warren v. Lynch*, 5 Johns. 240, there was no question of this kind. The note was given for a good consideration, and passed away for a good consideration, incurred on the faith of it as it appeared. There was ground of suspicion that it was made originally from A to C, for a debt A owed B, with the intent of avoiding the creditors of B; but it was held that the plaintiff, an innocent endorsee, could recover. In that case, the maker had no equities, though B's creditors might have had; but they were not parties to the controversy. This is the case cited by Story, *Russell v. Ball, et al.*, 1806; the only question discussed, was, "whether the defendants could have been permitted to impeach the note, by showing a want of consideration, or that it was fraudulently obtained; without showing that the endorsee was not a fair and *bona fide* holder, for a valuable consideration; and it was held that he could not; a mere question of *onus probandi*."

The cases following, *Coddington v. Bay*, in New York; *Bristol v. Sprague*, 8 Wend. 423; *Rosa v. Brotherton*, 10 Wend. 85; *Ontario Bank v. Worthington*, 12 Wend. 593; *Payne v. Culler*, 13 Wend. 605, are admitted to be in point.

In the Supreme Court of Maine, the subject was also learnedly re-examined, in the case of *Bramhull v. Brackett*, 31 Maine, 205, explaining *Howes v. Smith*, 16 Maine, 179, and *Norton v. Waite*, 2 App. Rep. 175, which were supposed to bear against it. The Court reviews the case of *Swift v. Tyson*, and disapproves of, and approves of the rule in *Stacker v. McDonald*, and says that it is so decided in most of the other States.

In addition to the authorities which I have cited, in the course

of the argument, I would also refer the Court to the following: *Jenners v. Bean*, 10 N. H. 266; *Williams v. Settle*, 11 N. H. 16; *Doe v. Burnham*, 11 Foster N. H. 483; *Petue v. Clark*, 11 S. & R. 377; 2 Miles, 203; Id. 362; *South v. Babcock*, 2 W. & M. 288; *Ellicott v. Martin Lowe & Co.*, 6 Md. 515; 1 M. C. W. Dec. 445; 9 Gil. 137; *Sargeant v. Sargeant*, 18 Vt. 377; *Sanford v. Norton*, 14 Vt. 233; *Keyes v. Wood*, 21 Vt. 336; *Lapice v. Clifton*, 17 La. 98; *Boyd v. McVoor*, 11 Ala. 822; *Middletown Bank v. Jerome*, 18 Conn. 449.

Janes, Barber & Boyd, and *R. F. Morrison*, for Respondent.

Payne is a *bona fide* holder of the note, for a valuable consideration, although he took the same in payment, or merely as collateral security for a pre-existing debt. (*Swift v. Tyson*, 16 Pet. 19 to 22; *Brush v. Scribner*, 11 Conn. 388; *Riley v. Anderson*, 2 McL. 589; *Gibson v. Conner*, 3 Kelly, 47; *Allaise v. Hartshorne*, 1 Zab. 663; Story on Promissory Note, 195; *Carlisle v. Wishart*, 11 Ohio, 172; 8 Met. 40; 3 *Cush. 162; [266] Story on Bills, Sec. 292; 3 Kent's Comm. 80; Byles on Bills, 97, (note); *Pugh v. Durfee*, Black. 412.)

The plaintiff lost his remedy by attachment, in consequence of the assignment to him of the note. Taking the note of a third person as collateral security, was in effect a mortgage.

"Both in law and equity, the mortgagee has only a chattel interest; in common sense, he has only a pledge." (1 Hilliard on Mortgage, 163.)

The word mortgage is derived from two French words, *mort*, dead—and *gage*, pledge, and means a dead pledge. (Webster's Dic.)

Mortgage is defined as a "pledge of goods and chattels by a debtor to his creditor, as security for the debt." (Kent's Com.; Webster's Dic.)

The surrender of a legal right, is a valuable consideration in law. (11 Serg. & R. 388; 1 Parson's on Contracts, 369; and authorities there referred to.)

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

The only question in this case is, whether a negotiable promissory note not yet due, and *bona fide* taken as collateral security for pre-existing debt, is subject, in the hands of the endorsee, to any defense existing at the date of the assignment, between the original parties.

The authorities on this point have been conflicting, and the research and industry of counsel have brought before us the leading decisions on both sides of this question. It will not be necessary to attempt a review of the numerous authorities to which we have been referred. The greater number of decisions would seem to support the position taken by the counsel of defendant, while the more recent decisions sustain that of the plaintiff, without giving any decided opinion upon the point. I

must say, with Chancellor Kent, alluding to the decision in *Swift v. Tyson*, 16 Pet. 1, that "I am inclined to concur in that decision, as the plainer and better doctrine." (3 Kent, 80; note A.) But all the authorities agree in one position, that if there be any new consideration for the assignment, then the assignee is a holder for value, and the maker is precluded from resorting to defenses that might make against the payee, were the suit brought by him.

It is insisted by the counsel for the plaintiff, that before he took the note of Bensley as collateral security for the pre-existing debt, Payne had a remedy, by attachment, against his debtor, but that by taking the collateral security the plaintiff lost that remedy, and that the loss of this remedy constituted a new consideration moving from Payne to his debtor, the assignee of the note.

[267] *By the provisions of the one hundred and twentieth section of the Practice Act, the remedy, by attachment, does not exist where the contract is "secured by a mortgage upon real or personal property."

It is conceived that the force of this point made by the counsel of plaintiff, will depend upon the construction of the phrase "mortgage upon personal property," as used in our statutes.

In strictness, the assignment of this note to Payne was not a mortgage, but a mere pledge, of the note. (*Dewey v. Bowman*, ante 145.)

Under the old decisions, the legal ownership of mortgaged real estate was vested in the mortgagee. (4 Kent, 138.) But by repeated decisions of this Court, it has been settled that under our statute, a mortgage is a mere security for the debt, and the legal title remains in the mortgagor until foreclosure and sale. (2 Cal. 387, 492; 5 Cal. 334; *Guy v. Ide*, 6 Cal. 99, January, 1856; Pr. Act, Secs. 260, 266.)

If, then, the word *mortgage*, when applied to real property, only means a *security* for the debt, should not the same word in the same sentence, and in the same connection, mean the same thing when applied to personal property? The object of the attachment is to obtain *security* for the judgment; and when the party already has that security, the statute will not allow him to use this process to obtain that which he already possesses. Whether the creditor has a mortgage upon real or a pledge of personal property, he has *security* for his debt. In both cases, he has substantially the same interest in the property. The mortgage, in the one case, and the pledge in the other, must be essentially the same, and intended to accomplish the same end.

It would then seem clear that the intention of the Legislature was to use the word mortgage, as applicable to personal property, in its widest extent. If we give it a strict construction, and say that the word, as used in the statute, can only apply in a strict sense, then the term can have no rational meaning, in the connection in which it is found. "A mortgage of personal property passes the present legal title in the property itself to

the mortgagee, subject to be re-vested in the mortgagor, his heirs or assigns, upon the performance, by him, or them, of an *express condition subsequent*." (*Dewey v. Bowman*.) The title of the property being already in the mortgagee, remains in him if the condition subsequent be not performed. The mortgagee has no occasion to sue, as the mortgagor had no positive obligation to perform. There is nothing that the mortgagee has to enforce by suit. Now, the statute clearly contemplated such a mortgage upon real and personal estate, as constituted a *security* for a contract that must be enforced by a sale of the property, either with or without suit. But a mortgage of personal property cannot constitute a *security* for debt any more than could a conditional *sale. The difference between a [268] mortgage and a conditional sale of personal property is substantially this: In the first, the property passes at once, subject to be re-passed upon the performance of an express condition subsequent, while in the second, no present title passes to the purchaser, but rests upon the performance of the condition subsequent.

This could not have been the intention of the Legislature. And if we hold that the term must be taken in its strict sense, when used in the one hundred and twentieth section of the Practice Act, then a creditor can still attach, though holding a pledge of personal property at the same time.

It is no answer to this view of the case to say that the creditor is not compelled to hold the collateral security, but may surrender it at any time, and attach. It may admit of great doubt whether he could surrender the security and attach without the consent of his debtor. The latter has acquired some rights, by giving the collateral security, as well as the former. This freedom from the oppressive remedy by attachment, may have constituted the principal motive on the part of the debtor, for giving collateral security for a pre-existing debt. The relation of the parties to each other, is not the same after this collateral security is given, as it was before.

The District Court seems to have taken the correct view of the law applicable to the case, and its decision is therefore affirmed.

CHIPMAN ET AL. v. HIBBARD ET AL.

¹ INJUNCTIONS, WHEN WILL NOT LIE.—Courts of co-ordinate jurisdiction have no power to restrain the judgments of each other.

APPEAL from the District Court of the Fourth Judicial District, County of San Francisco.

This was a bill in equity filed in the Fourth Judicial District, setting forth the circumstances under which the defendant Hibbard had obtained a judgment in ejectment in the District Court

1. Cited *Pizley v. Huggins*, 15 Cal. 134; *Crowley v. Davis*, 37 Cal. 290. See *Rickett v. Johnson*, ante 24; *Revalk v. Kraemer*, ante 66; *Phelan v. Smith*, post 520.

of the Third Judicial District, against the plaintiffs in this suit, and praying, among other things, that the defendant Hibbard, and his co-defendant Emeric, (who, it was charged, was interested in that judgment,) be required, under the pain of a perpetual injunction, restraining them from proceeding under their judgment in injunction, to enter into a rule, or otherwise consent and stipulate, that in the ejectment suit a new trial be granted.

The Court below, after hearing the testimony in the case, rendered a decree in favor of defendants, dismissing plaintiff's bill.

Plaintiffs-appealed.

[269] **Williams, Shafier & Park*, for Appellants.

This is a bill in equity for a new trial at law, on the ground of "excessive damages appearing to have been given, under the influence of passion or prejudice;" the remedy by motion for new trial at law, having been lost without the fault of the party.

A Court of Equity has jurisdiction to grant new trials at law. (*Bell v. Davis*, 1 Cal. 134; *Burnett v. Kilburne*, 3 Cal. 327; *Bucklew v. Chipman*, Oct. T. 1855; *Gray v. Eaton*, Oct. T. 1855.)

It is not necessary that the bill should be filed in the Court where the judgment at law was rendered. It may as well be filed in the District Court of another district.

Considerations of comity have no just application to the question—for the Court rendering the judgment at law, has no relations whatever to the proceeding. The decree does not act upon its records, nor does it contain any mandate directed to the Judge.

The ground of the jurisdiction is, that a Court of Equity has power to act upon the person *Æquitas agit in personam*. Though it cannot affect the judgment by direct action, still it can bind the conscience of the party in regard to the judgment. The established form of decree is, that the party enter into a rule for a new trial in the Court in which the judgment remains, or that he be perpetually enjoined from taking out execution on the judgment.

On the maxim before quoted, (*Æquitas agit in personam*), Courts of Equity may compel the specific performance of contracts respecting land abroad. (Sto. Eq. vol. 2, Sec. 743; *Tbl-ler v. Cartaret*, 2 Vern. 495; *Sutton v. Fowler*, 9 Paige, 280.)

On the same principle, they have power to stay proceedings in the Courts of foreign countries, though nothing is clearer than that the Courts of one country cannot exercise any control or superintending authority over those of another country. (2 Sto. Eq. Sec. 899, and the cases cited in the note; 2 Paige, 606, *Mitchell v. Bame*.)

Again, "comity" has no application, except as between sovereignties; it is inapplicable as between the tribunals of a par-

ticular country, when the jurisdiction of each is defined by law. (1 Bouvier L. D. Tit. Comity.)

Assuming that Courts of Equity have the jurisdiction claimed over the particular subject-matter presented, the only question that can by possibility be started, of a jurisdictional character, is a question of *venue*, and that is settled by the Practice Act, in favor of "the county in which the parties, or some of them, reside at the commencement of the action."

Or if there was a mistake in the venue, then the party should have moved for a change; not having done so, the mistake must be considered as waived. (2 Code R. 110, *Millingham v. Brophy*.)

*This loss of right was by an "accident," viz: the accident of adjournment. (Sto. Eq. secs. 78, 79.) [270]

But admitting that there was negligence, still a Court of Equity has power to grant a new trial on the iniquity of judgment. (*Maine Ins. Co. v. Hodgson*, 7 Cranch, 332; 3 Cal. 464.)

E. W. F. Sloan, for Respondents.

I do not contend that a bill for relief after trial at law, might not be filed in another Court, but there are many reasons why such practice should not be encouraged.

But it is said that if there was negligence, yet because of the inequitable character of the judgment, chancery will relieve.

The case of *Maine Ins. Co. v. Hodgson*, 7 Cranch, 332, is scarcely applicable. In that case a defense was sought to be made available in equity, which it was competent for a Court of Equity to enforce, and the question was, whether the defense was one equally available at law, and there had been a trial at law, a Court of Equity would then interpose, and the relief was denied.

"The rule is, says Chancellor KENT, that chancery will not relieve against a judgment at law, on the ground of its being contrary to equity, unless the defendant in the judgment was ignorant of the fact in question, pending the suit, or it could not have been received as a defense, or unless he was prevented from availing himself of the defense by fraud or accident, or the act of the opposite party, unmixed with negligence or fault on his part. (*Foster v. Wood*, 6 Johns. Ch. 89.)

"It would be establishing a grievous precedent, and one of great public inconvenience, to interfere in any other case than one of indispensable necessity, and wholly free from any kind of negligence." (Per Ch. Kent, on bill for new trial in *Floyd v. Jayne*, 6 Johns. Ch. 479.)

"The defendant cannot come here for a new trial, where no special ground of fraud or surprise is suggested, and when he neglects or omits due diligence, and without due excuse, to defend himself in his proper place; this is a fundamental doctrine of this Court." (*Barker v. Elkins*, 1 Johns. Ch. 464.)

"Relief cannot be had here for the purpose of a new trial

when the party has lost his opportunity at law by his own negligence." (*Dodge v. Strong*, 2 Johns. Ch. 229.)

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

This is a bill in equity for a new trial, in an action of ejectment, on the ground of excessive damages, the remedy by motion for a new trial having been lost, without the fault, as is alleged, of the plaintiff. The ejectment suit was tried in [271] the *Third District Court, and this bill is filed in the Fourth District Court.

We decided in the late case of *Rickett v. Johnson and others*, ante 34, that a Court of co-ordinate jurisdiction could not entertain proceedings to restrain the judgments of another. The plaintiffs should have proceeded before the District Court of the Third District.

Judgment affirmed.

LASSEN v. VANCE.

¹ **HOMESTEAD, WHEN SUBJECT TO MORTGAGE.**—Where A, who is a married man, is occupying premises as the tenant of B, and concludes to purchase the same, and to do so borrows the whole of the purchase-money from C, and to secure the payment thereof to C, mortgages the premises to him, but the wife does not sign the mortgage: *Held*, that the homestead right was subject to the mortgage.

IDEM.—DEED AND MORTGAGE, WHEN ONE TRANSACTION.—The deed and mortgage being simultaneous, were but parts of the same transaction.

IDEM.—It would seem, under the circumstances, that neither the husband nor his wife, had either legal or equitable right to the premises.

APPEAL from the Superior Court of the City of San Francisco.

Plaintiff filed his bill for the purpose of foreclosing a mortgage, executed by defendant Vance.

The facts of the case as developed by a special verdict, are as follows:

That on the 4th day of January, 1855, the defendant gave a mortgage on a lot in San Francisco, to secure the payment of the sum of three thousand dollars.

That the defendant was then a married man of family, and had lived in the lot with them some two years, as a tenant of Francis Mellus; that there were two dwelling-houses thereon, both built by defendant while holding under a lease from Mellus, in one of which he resided at the date of the mortgage, and continues to reside; that his wife did not sign the mortgage; that simultaneously with the execution of the mortgage, a deed was made by Mellus to the defendant, but dated on the 3d of January, 1855, for the premises in question, and the money which the plaintiff loaned the defendant and secured by the mortgage, was paid to Mellus, in consideration for the deed

1. Distinguished, *Burnap v. Cook*, 16 Iowa, 154.

then made. That at the time the mortgage was given, the defendant had possession of other property on the same street, and was considered well off. That the mortgaged premises were not worth more than five thousand dollars.

The Court granted the decree of foreclosure, and the defendants Vance and wife appealed.

Chas. D. Judah for Appellant.

*The statute which exempts the homestead from forced [272] sale, provides that such exemption shall not extend to a mortgage executed for the purchase-money.

It is contended by the respondent that this is one of the excepted cases, and that a resulting trust is established in favor of Lassen by the evidence.

We say not. That Lassen was in no way privy to the passing of the estate. He was not a vendor, but a money-lender, taking his interest upon a loan made to Vance, with security for the money.

Purchase-money is that which is defined by the authorities to be that which passes between vendor and vendee. (13 Ohio, 148, *Stansell v. Roberts*.)

This case is directly in point. The Court say in that case:

"Neither can the benefit of the lien or the purchase-money be claimed by Jennings. He loaned the money to Roberts to make the first payment on the land. The purchase-money is what passes between the vendor and vendee, and the lien is the right of the vendor to look to the thing sold for the price for which it was sold. But money advanced by a third person, to enable the purchaser to buy, is no part of this transaction, nor is he who advances privy to the sale, nor can it be construed into a resulting trust, that exists where land is purchased with the money of another. But this purchase was made by Roberts, with his own money, borrowed from Jennings."

This case is similar to the one at bar. The case shows, page 155, that the money was loaned by Jennings to Roberts, "and paid over to the vendor, for the land; that it was borrowed for that purpose, and so appropriated."

The jury find, in the case at bar, that "the money which the plaintiff loaned the defendant, was paid to Mellus, in consideration for the deed then made."

In the case of *Davis v. Peabody*, 10 Barb. page 91, the Court say, in construing the New York statute declaring that the exemption of property therein authorized shall not extend to an execution on a demand for the purchase-money of such property, etc.:

"But the words purchase-money, in such proviso, should be held to mean the original demand for the property sold, as distinguished from the demand on the security, given for the payment of the purchase price."

In the case of *Godeffroy v. Caldwell*, 2 Cal. 493, this Court say:

"One who advances money as a loan, although it is expressly for the payment of materials and labor devoted to the erection of a building, can have no claim to the benefit of a mechanics' lien law."

The plaintiff, Lassen, contends that he has an equitable [273] lien *upon the land. In other words, that there is a resulting trust in his favor, which is analogous to that of a vendor's lien, and cites cases of dower to show that the wife is barred in cases of instantaneous seizure.

Every case that can be cited to establish a resulting trust, or bearing upon this question of dower, will show:

1. That in cases of resulting trust, the money with which the estate was purchased was, of strict right, the money of him who sets up the trust, and the whole doctrine of trusts proceeds upon the fact that the application of the trust-money was for the benefit, exclusively, of the owner of the money, and that it would be a fraud for a party occupying the position of an agent, trustee, or any other fiduciary capacity, to retain the property of another. Any other case of resulting trust in the books, will be found to rest upon the express agreement of the parties, made at the time of the purchase, and there must be evidence clear, establishing such agreement. (See *Forsyth v. Clark*, 3 Wend. 637.)

In the case of *Stow v. Teft*, 15 Johns. 462, which is a case of dower, Mr. Justice SPENCER says:

"I am authorized to say, by the decision of this Court," etc., "that where two instruments are executed at the same time, between the same parties, relative to the same subject-matter, they are to be taken in connection as forming the several parts of one agreement."

In this case the vendee executed to the vendor, simultaneously with the conveyance to him, a mortgage to secure the purchase-money; the Court held the widow barred.

Mr. Chief Justice THOMSON dissented; but see 4 Mon., *Tevis v. Steele*, 339, 340, and *McClure v. Harris*, 12 B. Mon. 266.

In the case of *Jackson v. Beebe*, 15 John. 477, cited by respondent, the mortgage was executed for the purchase-money, but not to the vendor, but the case turned upon a statute relating to judgments obtained previously against the purchaser.

McDougall, Aldrich & Sharpe, for Respondent.

The deed and mortgage having been executed and delivered simultaneously, were one and the same transaction. There was no time at which the homestead claim could attach. The law, as settled in regard to claims for dower, under like circumstances, must govern this case. There is no difference whatsoever in principle, between the two classes of claims, when set up under circumstances like the present. (1 Sand. Ch. 76; 4 Mass. 566; 15 Johns. 458; 14 Mass. 351; 15 Pet. 21; 4 Leigh, 30; 5 Cal. 455.)

The appellants, up to the time of the execution and delivery

of the deed and mortgage, had occupied the premises under *lease from the vendor of Vance. They had no [274] title, or claim of title to the premises, and no claim or right of homestead could attach during the tenancy. The mortgage having been executed at the same time with the deed, the premises passed to Vance, encumbered with the mortgage. (6 Tex. 303; 11 Tex. 346.)

The respondent having furnished the money to Vance, with which the premises were purchased by him, is protected by the provision of the statute which dispenses with the signature and acknowledgment of the wife, when the mortgage shall be "executed to secure the payment of the purchase-money." (Act to exempt the homestead, etc., Comp. Laws, p. 850, Sec. 2.)

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

The defendant, James Vance, resided, with his wife, upon certain premises, as the tenant of Francis Mellus, for some two years prior to the 4th of January, 1856. On that day, defendant, James Vance, borrowed of plaintiff three thousand dollars, and executed to him a note, and a mortgage upon the premises, and at the same time took from Mellus a conveyance to himself. The money borrowed of the plaintiff was paid to Mellus for the lot. The defendant, James Vance, and wife, continued to reside upon the premises, and claimed the right of homestead as against the mortgage to plaintiff. The Court below decreed the sale of the mortgaged premises, and Vance and wife appealed to this Court.

It would seem that the defendants, Vance and wife, have neither an equitable or legal right of homestead in the mortgaged premises. The deed from Mellus to James Vance, and the mortgage from him to plaintiff, were simultaneous acts, and the money borrowed was the entire amount paid for the lot. The money of plaintiff paid for the lot, and it certainly would be an exceedingly harsh rule of law, that would defeat his mortgage upon the very property purchased with the money furnished by himself.

In his Commentaries, Chancellor KENT says:

"A transitory seizin for an instant, when the same Act that gives the estate to the husband conveys it out of him, as in the case of a donee of a fine, is not sufficient to give the wife dower. Nor is the seizin sufficient when the husband takes a conveyance in fee, and at the same time mortgages the land back to the grantor, or to a third person, to secure the purchase-money, in whole or in part." (4 Kent, 39.)

The doctrine laid down by the learned American commentator, was fully sustained by the Supreme Court of the United States, in the case of *Mayberry v. Brien and others*, 15 Peters, *21. Also, by other cases. (1 San. Ch. 76; 4 [275] Leigh, 30; 15 John. 458; 4 Mass. 566; 6 Tex. 294.)

The deed and mortgage being simultaneous, were but parts of the same transaction. (15 Johns, 462; 4 Mass. 569; 12 Mass. 352.)

Judgment affirmed.

THOMPSON ET AL. v. LEE ET AL.

INSTRUCTIONS, WHEN MAY BE REFUSED.—Instructions to the jury are properly refused when not warranted by the pleadings.

EVIDENCE—BURDEN OF PROOF.—The failure of a defendant to deny the charges in a complaint, making out a *prima facie* case for the plaintiff, will throw the *onus* on defendant of proving his affirmative allegations.

WATER RIGHTS, EVIDENCE OF POSSESSION.—A notice of intention to appropriate the waters of a certain stream is evidence of possession, but of itself, alone, is not sufficient. Taken with other acts, it amounts to sufficient evidence.

APPEAL from the District Court of the Fourteenth Judicial District, County of Sierra.

The plaintiffs in this case averred that their grantors, in March, 1852, posted a notice on North Slate Creek, claiming the waters thereof, and of all the ravines that might be crossed by their contemplated ditch, from that point to Gibsonville. That surveys were made, and the ditch dug, by which the waters of the north branch of Slate Creek, and also of Third Ravine, had been appropriated. That the defendants, subsequent locators, had wrongfully diverted and used the waters of Slate Creek and Third Ravine, to the great damage of plaintiffs, etc.

The prayer of the complaint comprehended damages, and an injunction restraining defendants from using the waters, etc.

The following answer was filed by defendants:

“The defendants in the above case, answering, deny that plaintiffs posted a notice at the time and place mentioned in their complaint, claiming the waters of North Slate Creek. That they surveyed the same, in manner and form as set forth in their complaint.

“They further deny that plaintiffs, by any act of theirs, ever acquired any right, by the laws and customs of miners, to the north branch of Slate Creek, but affirm that defendants are the true and lawful owners of the same, and have been in possession of said branch, and the waters thereof, for the last two years.

“Defendants further deny that they have ever taken the waters of the Third Ravine, and that they have ever asserted any right to the same, or that they have ever received any notice in regard to the same, from plaintiffs.

“Defendants, further answering, say that they have not, [276] by any *illegal act of theirs, damaged plaintiffs, and that they have done nothing in the premises further than to use the said waters of the north branch of Slate Creek, to which they have a good and valid right and title. That, in the year 1852, they posted a notice upon the north branch of Slate

Creek, claiming its waters. That they proceeded at once to survey and dig a ditch, conveying the same to Whisky Diggings; and that since that time they have taken said waters to Gibsonville; and that they have been in peaceable possession of the same. Wherefore they pray," etc.

The jury found a verdict for the plaintiffs, for four hundred dollars damages, on which judgment was entered, and also a perpetual injunction awarded, restraining defendants from diverting so much of the waters of Slate Creek and Third Ravine, as was necessary to fill plaintiffs' ditch.

From this judgment defendants appealed.

The nature of the instructions given and refused, appears in the opinion of the Court, and the argument of counsel.

Dunn & Meredith, for Appellants.

1. The Court erred in refusing the instructions asked for by defendants' counsel, the same being intelligibly expressed, sound and correct in a legal view, and applicable under the pleadings and evidence.

"Possession, or actual appropriation, must be the test of priority, in all claims to the use of water, wherever such claims are not dependent upon the ownership of the land, through which the water flows. * * * Such appropriation cannot be constructive." (*Kelly v. Natoma Water Co.*, 6 Cal. 105.)

"The design to appropriate cannot give exclusive rights, until executed, but the actual possession alone can give the right." (*Kelly v. Natoma Water Co.*, 6 Cal. 105.)

2. The Court erred in substituting its own charges to the jury, for those asked by defendants' counsel; the former being partial, and less applicable under the pleadings, calculated to mislead the jury, entrenching upon the province of the jury, by presuming a fact in issue, less comprehensive and intelligible, contradictory in themselves, and erroneous in law.

Our statute, regulating pleadings, distinctly provides for the general issue at common law, and a general denial, in plain language, is equivalent, in our practice, to the general issue at common law. (2 Cal. 513.)

"The Court must give or refuse the instructions asked for. It may modify the phraseology, but cannot alter the sense. Where instructions are proper they should be given as asked." (*Jamison v. Gunary*, 5 Cal.)

"The Court must give or refuse the instructions as asked for, and no modifications, which alter the meaning, or might mislead the jury, can be substituted." (3 Cal. 400.)

*"The practice of substituting the instructions of the [277] Court for those asked by counsel is a dangerous one, giving rise to many perplexing difficulties." (2 Cal. 176.)

G. N. Swezy, for Respondents.

The first and second instructions offered by the defendants and refused by the Court, related wholly to the character of evidence required to prove a transfer of Kinsey's interest in the

plaintiffs' ditch claim, to the grantors of the plaintiffs. These instructions were properly rejected by the Court, and its rulings to the jury instead thereof were proper. The complaint set out in full the location of the plaintiffs' claim and acts of continued possession, and the transfer of all the rights and interest of the original locators and owners, through various subsequent holders, to the present plaintiffs, and is verified. The answer only denies, "that the plaintiffs by any acts of theirs ever acquired any rights by the laws and customs of miners to the north branch of North Slate Creek;" and affirms "that the defendants are the true and lawful owners of the same, and have been in possession of said branch and the waters thereof for the last two years."

This is but a bare denial that the plaintiffs acquired any rights by any personal acts of their own, in the location of said claim under the mining rules and customs, and an assertion of ownership and possession in themselves of the franchise to use the waters of said creek. The complaint does not allege that the plaintiffs ever located the claim and performed the acts requisite to constitute an appropriation and possession of that class of property, but distinctly alleges the same to have been done by others, their predecessors from whom they received the same by transfers. The allegations of the complaint that the rights acquired by such appropriation and possession, were properly transferred and held by these plaintiffs, are in no manner denied by the answer. The fact of such transfers and the manner of the same are distinct and specific allegations embodied in the complaint, requiring "a specific denial to each allegation controverted by the defendant." (Sec. 46, Pr. Act, as amended in 1854.)

It cannot be maintained, as urged by the appellants, that the assertion of ownership, in their answer, to the waters of said creek, amounts to a denial of the allegations of the various transfers set forth in the complaint. Taken in its broadest sense it can be regarded as no more than a denial of ownership to the waters in the plaintiffs, and it is very questionable whether it would ever amount to a "specific denial" of such allegation as is required in cases of verified complaints. The case of *McLarren v. Spaulding*, 2 Cal. 510, 3, is a case of general denial, and therefore not applicable.

Section sixty-five of the Practice Act, as amended in [278] 1854, *provides that "Every material allegation of the complaint, when it is verified, not specifically controverted by the answer, shall, for the purposes of the action, be taken as true."

The defendants could well have denied any right or franchise in the plaintiffs to the use of the waters of said branch of Slate Creek; and the same might have been true, and yet the facts of such transfers and acts on the part of said plaintiffs and their predecessors have been true also. The complaint alleges that the plaintiffs' predecessors located and surveyed a ditch from

Slate Creek to Gibsonville, and appropriated the waters thereof and became possessed of the franchise of the same; that the rights and privileges so acquired were transferred to the plaintiffs, and that they were now the owners thereof and entitled to the possession and enjoyment of the same. The answer does no more than deny the prior location and appropriation, and asserts the ownership in the defendants, leaving the allegation of the various transfers of the plaintiffs' predecessors to them, in no manner controverted. The appellants contend that the Court erred in not giving the fifth instruction, namely:

"A notice is a mere declaration of intention to possess, but not evidence of possession."

The rejection of this instruction was proper, upon the ground that the instruction implies no act, except the posting of a notice, upon the part of plaintiffs, to appropriate the waters, whereas the proof shows that immediately after the posting of notices by Smith and Higgins, the first appropriators, and through whom plaintiffs claim, a survey was made, the proposed line of the ditch marked out, and work commenced upon the ditch at Gibsonville as soon as the depth of snow would permit, by which acts plaintiffs' predecessors acquired an actual possession of the waters of North Slate Creek and its tributaries.

In the case of *Conger v. Weaver*, 6 Cal. 548, it was held that "in the case of constructing canals under the license from the State, the survey of the ground, planting stakes along the line, giving public notice, and actually commencing and diligently pursuing the work, is as much possession as the nature of the subject will admit, and forms a series of acts of ownership, which must be conclusive of the rights."

By this rule, the giving of notice, or posting of the same, was one of the series of acts that gave possession, and constituted a part of the evidence of the conclusive right of ownership. Indeed, from the very nature and character of these water-claims, it is one of the most important acts of the party, and tends more to prevent imposition upon the public than any of the others. The party may make a survey, set stakes along the line thereof, and immediately commence work thereon; and continue the same; and yet, none of these acts, unless far progressed, would convey an idea to other persons [279] desiring to turn the water of a particular stream, that they were intending to construct a trail, road, or ditch. Besides, as above stated, the instruction was improper, considering the facts of this case, and calculated to mislead the jury.

The sixth instruction asked by defendants, "That if the plaintiffs fail to show their possession of the water of Slate Creek previous to the occupation of defendants, then the jury must find for the defendants," was properly rejected upon the ground that the complaint alleged the prior appropriation of the water of Slate Creek, by certain parties through whom plaintiffs claim, and also the construction of the ditch by the

plaintiffs and their predecessors, and is verified, while the answer makes no denial of the appropriation of the waters, and the construction of the ditch, as alleged in the complaint. As above contended, every material allegation, not specifically controverted by the answer, is deemed admitted for the purposes of the action. It therefore would have been error to have required proof of an admitted fact.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

The complaint alleges in substance, that in March, 1852, Higgins and Smith posted a notice on North Slate Creek, claiming the waters of the stream, and of all ravines that might be crossed by a ditch from that point to Gibsonville, where the water was to be used for mining purposes; that surveys were made, and the ditch partly dug by the parties through whom the plaintiffs claim, and that the ditch was finally finished by plaintiffs; that the predecessors of plaintiffs had appropriated the waters of "Third Ravine," a ravine crossed by the ditch, and that the defendants had wrongfully diverted the waters of the north branch of North Slate Creek, and also of Third Ravine from plaintiffs' ditch. The defendants in their answer, deny that plaintiffs posted the notice, or made the surveys as alleged. They also deny, in general terms, that plaintiffs, by any act of theirs ever acquired any right to the waters of the north branch of North Slate Creek, and affirm that the right to the use of the water of said branch is in them. They also deny that they ever diverted the waters of Third Ravine from the ditch of plaintiffs. The complaint and answer were both verified.

The object of the plaintiffs in setting out the facts of their case in detail, was, doubtless, to avoid the expense and trouble of proving specific facts, which the defendants could not specifically deny. The only material issue made by the specific denials of the answer, is that concerning the diversion of the waters of Third Ravine. The denial that plaintiffs posted the notice and made the surveys amounted to nothing, for [280] the reason, *that no affirmative allegation to that effect had been made in the complaint. The answer was not responsive to the allegations of the complaint in these particulars, and made no issue. (See the case of *Dewey v. Bowman*, ante 145.)

All the material allegations of the complaint which were not denied in the answer, were admitted as true. And as the verdict of the jury was for the plaintiffs, and no motion was made for a new trial, the only errors assigned have reference to the action of the Court in refusing certain instructions offered by the defendants, and in giving others in lieu of them.

The defendants offered, in all, eleven instructions, the third and fourth of which were given, and the others refused. The instructions refused by the Court, except the fifth, were not ad-

missible under the pleadings. The plaintiffs having alleged certain specific facts, which taken together, made out a *prima facie* case, as to their right to the waters of Slate Creek, and these facts not being denied, the *onus* of the proof was thrown upon the defendants, to sustain their affirmative allegations, that they were the first appropriators of the waters of the north branch of the stream.

The Court very properly instructed the jury that there were but two issues of any great importance. First, as to whether or not defendants had diverted the waters of Third Ravine from plaintiffs' ditch; and second, as to the priority of location and appropriation of the waters of the north fork of Slate Creek.

The fifth instruction offered by the defendants and refused by the Court was this: "A notice is a mere declaration of intention to possess, but not evidence of possession." This instruction was not correct, as offered. A notice is evidence of possession, but of itself, alone, is not sufficient. Taken with other acts, it amounts to sufficient evidence. It forms one of a series of acts, which, taken together, make the right perfect. (*Conger v. Weaver*, 6 Cal. 548.)

As to the instructions given by the Court, there would seem to be no error. Under the state of the pleadings there was very little for the jury to try. We can see no error in the judgment of the Court below, and the same is therefore affirmed.

***STILL ET AL. v. SAUNDERS ET AL.**

[281]

¹ **APPEAL—REVIEW IN EQUITY CASES.**—Chancery cases come before this Court upon the pleadings, testimony, and decree, and we must look to the whole record, and see if there is any error in the final decree.

¹ **IDEM.**—The verdict of a jury in a chancery case is only advisory to the Chancellor, or this Court.

EQUITY—WHEN WILL COMPEL CANCELLATION OF DEED.—Where husband and wife execute a conveyance of their homestead, which the husband delivers to the purchaser, before the purchase-money therefor is paid, which is afterwards fraudulently attached, in a suit brought by the real, though not the ostensible purchaser, against the husband alone: *Held*, that equity will compel a cancellation of the deed so obtained.

APPEAL from the Superior Court of the City of San Francisco.

One of the defendants in this case, A. L. Teschiera, having purchased certain premises, in the City of San Francisco, from John H. Still, and afterwards having discovered that Still's wife set up a claim of homestead therein, attempted to purchase her interest therein, without success. A second negotiation was opened, by one Charles R. Saunders, ostensibly in his own name, but in fact for Teschiera, who agreed to furnish the money, and did do so. Saunders, Still, and wife, finally agreed upon the sum of one thousand dollars. Still and wife executed and acknowledged the deed for the premises which the former

took to the office of Saunders, expecting to receive the money therefor.

After Still had parted with the possession of the deed, which was immediately sent to the recorder's office, for record, and while Saunders was counting out the money, the sheriff, who was in an adjoining room, according to an agreement between Saunders and one Mastick, the attorney of Teschiera, walked in and attached the money in Saunders' hands, in a certain suit of *Teschiera v. John H. Still*. Judgment having been obtained in this action, Saunders paid over to the sheriff the sum of nine hundred and fifty dollars, having paid the remainder, fifty dollars, to a creditor of John H. Still, according to an agreement made about the time of the sale. Saunders, before the commencement of this suit, conveyed the premises to Teschiera. This action was brought by Still and wife, for the purpose of having the deed to Saunders canceled. The case was tried before a jury. On the trial, the Court admitted evidence under the exception of defendants' counsel, for the reason that it was irrelevant, and also delivered certain instructions to the jury, to which the defendants objected. The jury found a general verdict for the plaintiffs, on which the Court rendered a decree in favor of plaintiffs, declaring the deed to Saunders void.

Defendants moved for a new trial, which being denied, they appealed.

E. B. Mastic, for Appellants.

[282] *The Court erred in permitting the plaintiffs to prove, by J. H. Frisby, a conversation between him, John H. Still, and Burgess, in relation to Mrs. Still's executing the deed. Neither of the defendants were present, and a conversation between third persons was clearly inadmissible. (2 Cal. 145.)

It cannot be claimed the evidence was immaterial. It tended to prove the allegation in the complaint that the premises were claimed and were a homestead, accompanied with the opinion of the notary, that the conveyance was not good unless executed by Mrs. Still; it also tended to show that Jane N. Still was then married to John H. Still, and is the only evidence showing that fact. Unless she had some interest in the premises, she could not claim the relief. The evidence was in support of the complaint, and material, and calculated to influence the jury in their verdict, and is a good ground for setting aside the verdict.

A verdict will be set aside for the admission of irrelevant evidence. (*Dresser v. Ainsworth*, 9 Barb. 619.)

Nor is there any evidence of fraud.

The fact that Saunders agreed to give one thousand dollars for the premises, and that the money was attached, is no evidence of fraud.

In what does fraud consist?

It cannot be in the fact that Saunders did not pay over the money to Still. His failure to pay in accordance with his agreement, does not constitute fraud. He swears he intended to pay, and he was in the act of paying when the attachment was served.

If the payment to the sheriff did not operate as a payment to the plaintiffs, it is no ground for setting aside the deed as fraudulent.

It is not alleged that he is insolvent and unable to pay, and if he was, the vendor's lien attached and could be enforced against Saunders and the defendant Teschiera, if he had notice and participated in the fraud.

There is no allegation in the complaint, or any evidence given showing that the plaintiff was induced by fraud to sell for the price of one thousand dollars, but, on the contrary, it seems that was all he asked.

Nor does the evidence show that Saunders obtained the deed unfairly, but the same was voluntarily delivered to him, and the plaintiff never even requested a return thereof, after the money was attached. He should have given immediate notice that he would not be bound. (*Alexander v. Uley*, 7 Ire. Eq. 242.)

There is no evidence to show that the defendant, Teschiera, had anything to do with the purchase, or in any way participated in the proceedings. "Fraud only gives a right to avoid a contract, the property vests till avoided, and all these *mesne* dispositions to persons not parties to, or not cognizant of the fraud, are valid." (*Stevenson v. Newnham*, 16 Law & Eq. 401.) To set aside a conveyance for fraud, the evidence [283] should be clear and distinct. (*Buck v. Sherman*, 2 Doug. Mich. 176; *Stine v. Skerke*, 1 Watts & S. 195.)

It cannot be presumed, it must be proved. (Story's Equity, Sec. 190; *Duval v. Coal*, 1 Md. Ch. Dec. 168; *Mattoon v. Eder*, 6 Cal. 110.)

There must not only have been fraud, but the plaintiffs must have been injured, and suffered damage. "Fraud without damage, or damage without fraud," says Coke, J., Bulstrode 95, "gives no cause of action, but the two must concur and meet together." (*Jones v. Keyburn*, 6 Eng. T. R., 378; *Cunningham v. Vaply*, 7 Id. 296; *Pratt v. Philbrook*, 33 Me. 17; 2 Kent Com. 490.)

Saunders actually paid to Still fifty dollars, and before he could have any relief, or abandon the contract, he was bound to tender the defendant back the money by him so paid, and put him in the same position as before the execution of the deed. (*Jackson v. Norton*, 6 Cal. 187; *Miller v. Cotton*, 5 Geo. 341; *Masson v. Bovet*, 1 Den. 69; *Van Epps v. Harrison*, 5 Hill 63; *Mumford v. Amer. Life Ins. Co.*, 4 N. Y. 403, 482.)

And he was bound to tender back and rescind without delay. Here it appears Still never asked or requested the defendant to rescind, or offered to pay back the money, or done any thing

until two months after the delivery of the deed, when this action was brought.

The charge of the Court was erroneous.

The question of homestead was material; without that allegation in the complaint, there was nothing to show that Jane N. Still had any interest, or was entitled to any relief, or could be joined as a party in the action.

It was a necessary allegation in the complaint, without which the complaint would have been demurrable; and it must be proved.

The property was alleged to be John H. Still's, and unless a homestead, how could Mrs. Still be made a party, or in any way be interested? She could have no interest—could not be prejudiced—could not maintain an action, and a recovery could not be had in her favor.

Jane H. Still might believe she was to get one thousand dollars, and that without any pretense of a fraud having been committed. Her belief did not constitute the fraud, and had nothing to do with it. "Fraud, in a judicial proceeding, can never be predicated on a mere emotion of the mind." (*People v. Cook*, 4 Seld. 67, 69.) The defendant never saw her; there is no evidence that she made any agreement, or even knew that one thousand dollars was to be paid—nor is there any evidence [284] *that she was to receive the one thousand dollars, or any other sum of money.

The verdict does not authorize the entry of the judgment. Where equitable relief is demanded, a trial should be had by the Court, or the jury directed to find the facts, or a special verdict.

Saunders & Hepburn, for Respondents.

Whether the land was homestead, or not, would seem to be immaterial, in an application of this kind, which is to regain what the defendants have got from us by fraud, and to which we are entitled, whether the subject of the conveyance be, abstractly, valuable or not. Mrs. Still is not now asserting her claim of homestead, so as to be put to proof of her title. She is demanding to be reinstated, simply, in her former relation to this property. So far as these defendants, and the deeds from her to Saunders, and from Saunders to Teschiera, are concerned, the application is not that she may realize her claim now, but that void deeds may be rescinded of record, in order that she may hereafter assert her claim if she chooses to do so; disembarrassed of the operation, at law, or otherwise, of her act fraudulently obtained. (See 2 Story's Eq. Secs. 699, 700.)

If a vendor of land in fee-simple seeks to set aside his conveyance for fraud, it would hardly be permitted a fraudulent vendee to attack the title and put the vendor to formal deraignment of his title, and proof of it. The case at bar is identical in principle.

The evidence of J. H. Frisby, was competent to disprove

fraudulent concealment of the fact of marriage, by showing an express assertion of it at the time of the original conveyance by John H. Still to Burgess. It was evidently introduced for this purpose and not to prove the facts of marriage and homestead, the former having been expressly admitted by the answer, and the latter proved by the testimony of Buckelew and Mastick.

If the evidence is therefore objectionable, it is because it was immaterial as merely proving the fairness of Mrs. Still, which, so far as her rights are concerned is, or may be, immaterial. But the unnecessary attempt of a party to overcome a supposed imputation of unfairness can hardly be regarded as a reason for setting aside a verdict, in the presence of other sufficient evidence in the cause to justify the finding and the judgment.

The objection is purely technical, and there can be no pretense that the result was, or could have been, substantially affected by the admission or rejection of the evidence. (See *Kilburn v. Ritchie*, 2 Cal. 145, *Clayton v. West*, Id. 381.)

The appellants have sought to show that they had no dealings in the premises, with Mrs. Still, or with her husband, as her agent, and, as they could not, therefore, have promised the thousand dollars to her expressly, she has no cause of action.

*The practical result of this scheme was to effect circuitously what the Homestead Act was especially intended to guard against, and that is, the subjecting the homestead to the liabilities of the husband, without the assent of the wife.

By false pretense of benefit to the wife they have procured her assent and execution of the deed, and, in pursuance of an opposite and fraudulent scheme and intent, they have subjected the property to the liability of the husband. In fact, the wife never has delivered this deed. Her assent to the delivery was upon payment of the price, and the evidence shows that the defendant Saunders, procured the custody and record of the deed without complying with the terms of the bargain, and without having seriously intended to do so for an instant.

The rule "fraud and damage must concur to give a cause of action," may be assumed to be absolutely correct for the purposes of this inquiry, and yet not affect the plaintiff's claim injuriously. In most cases to which it is particularly applicable, actual pecuniary and extraordinary damage is sought to be compensated in actions for that purpose—as for instance, a tradesman trusting a purchaser upon fraudulent representations of solvency by a third person. In such a case, unless damage ensues, there would be nothing but an abstract and resultless immorality to be compensated.

In the case at bar, the act itself is the measure of the damage, or, rather, is the very damage. It is not (like the cases to which the rule is ordinarily applied) a claim of collateral and independent damage—the existence of which, and its connection with the asserted fraud as the result of it, must necessarily be proved.

Here there is nothing to prove but the fraud, and the act or conveyance which it infects is necessarily avoided, and the interposition of the Court, in equity, is to clear the title of the vendor, whoever it may be, by rescinding the fraudulent conveyance and reinstating him in his former asserted relations to the property.

In reply to the observation, that we are seeking equity, and must submit to the obligations of performing it ourselves, we refer to the case of *Selover v. The American Russian Commercial Company*, decided at January Term of this Court, where the peremptory rule was established, that a married woman is not relieved of her common law incapacities in this State, and that in the disposition of her rights and property, the letter of the statute must be complied with. Her alienations are, and can only be, statutory, and the case at bar is a much less inviting one than the other, to deviate from the inflexible rules of law governing the disposition of their rights by married women. Besides, it is distinctly proved by the evidence of Frisby, that the claim of the wife was distinctly discussed at the execution of the first deed from John H. Still to Burgess, and that [286] Bur-gess distinctly assumed the risk of the outstanding claim of the wife.

The judgment in the cause seems to us exactly responsive to the pleadings, and consonant with law and the evidence.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

The plaintiff, John H. Still, owned certain premises, which he conveyed by deed on the 13th of November, 1853, to one Burgess, and Burgess, on the 13th day of November, 1853, conveyed the same to the defendant Teschiera. At the time the deed was made to Burgess, Still was a married man, and he and his wife boarded and lodged on the premises with a tenant, to whom they were rented. On the 13th day of November, 1854, Still and wife conveyed the premises by a joint-deed to defendant Saunders, who afterwards conveyed to Teschiera. After the delivery of the deed, and while Saunders was about to commence counting out the purchase-money, (except fifty dollars agreed to be paid by Saunders to another person by direction of Still,) the same was attached by the sheriff under an attachment at the suit of *Teschiera v. Still*. Still and wife then brought this suit to cancel the deed to Saunders, and also the deed from him to Teschiera.

They allege that the deed from them to Saunders was obtained by a fraudulent device; that they had the right of homestead, and that Teschiera was cognizant of, and aided in, the fraud. The case was tried before a jury, who found generally for the plaintiffs; judgment was given for them, and the defendants appealed.

The defendants objected in the Court below to the introduction of certain testimony, and to the giving of certain instruc-

tions. The trial was had before a jury, upon the issues generally, and not upon special issues.

In the case of *Smith v. Rowe*, 4 Cal. 6, it was decided that in a chancery case the Court had the right to direct special issues of material fact to be framed and submitted to a jury, although objection was made by one of the parties. It has been repeatedly held that in chancery cases the parties were not entitled to a jury. (*Walker v. Sedgwick*, 5 Cal. 192.)

In the same case it was held that this Court had to examine the facts, and is not concluded by the findings of the Chancellor. In the case of *Gray v. Eaton*, 5 Cal. 448, it was held that the granting of a new trial is entirely discretionary with the Chancellor, and his action is not revisable.

This being a chancery case, it would seem legitimately to follow from the principles settled by former decisions, that the alleged errors of the Court below in admitting improper testimony, and in giving improper instructions to the jury, cannot be *revised in this Court. The case comes before us [287] upon the pleadings, testimony, and decree, and we must look into the whole record, and see if there be any error in the final decree rendered by the Chancellor. As the verdict of the jury was but advisory, and not conclusive upon the Chancellor, or upon this Court, the improper testimony and the erroneous instructions, can do the party no injury, if justice has been rendered him in the final result. And whether justice has been correctly administered or not, will depend entirely upon the facts as admitted and proved, and not at all upon the verdict of the jury.

Taking this view of the case, it will not be proper or necessary to consider the errors assigned in reference to the admission of improper testimony, the giving of improper instructions, or the refusal to grant a new trial.

The only error assigned that would seem material to the case is, that the plaintiffs, before bringing the suit, did not offer to return the fifty dollars paid to Still by Saunders, and demand a reconveyance of the property. This objection is met by the counsel of plaintiffs, by assuming that the payment to Still was not authorized by Mrs. Still, and was, therefore, a matter of personal trust—Still being individually liable to the defendants for a return of the money. But this answer seems to be entirely insufficient. The possession of the deed by the husband, already executed and acknowledged by both husband and wife, was *prima facie* evidence of his authority to receive the purchase-money. Besides this, the complaint alleges that "the said John H. Still, at the request of his said wife, took said deed for the purpose of delivering the same to the said Saunders, and receiving the money which she had been promised."

But there is nothing in the testimony to show that the fifty dollars were paid before, or at the time, the deed was made. It appears that John H. Still was indebted to another person, and that it was agreed between him and defendant Saunders,

that the latter should pay this debt, and that this payment should constitute a portion of the purchase-money. It lay upon the defendant to show when and how this payment was made. But it would seem clear from the testimony, that it was made after the delivery of the deed, and the fraudulent attachment of the purchase-money. The debt not having been paid at the time the deed was delivered, and the money fraudulently attached, any payment afterwards made by Saunders to a creditor of Still's, was made in his own wrong, and as a voluntary payment.

Taking all the testimony together, it was a clear case of fraud, and the judgment of the Court below is, therefore, affirmed.

[288]

*PEOPLE v. McDERMOTT.

PERJURY, WHAT DOES NOT CONSTITUTE.—Where a defendant executed his promissory note, and the holder thereof brought suit upon it, and set it out in his complaint, and the defendant, in his answer, which is sworn to, says: "That the note set out in the complaint was not his note; that he admitted that about the date of the note sued on he made a note for the same amount to the plaintiff, but that note the defendant was confident, and so charged the truth to be, was not for 'value received,'" and so the defendant denied the note set out in the complaint of the plaintiff: *Held*, not to be perjury.

PROMISSORY NOTE, LEGAL EFFECT.—The legal effect of a promissory note is the same, with or without the words "value received."

PERJURY, WHAT ESSENTIAL TO.—A conviction for perjury cannot be sustained without the false oath be material to the issue, and, therefore, prejudicial to some one, otherwise, however willful, it cannot be perjury.

APPEAL from the Court of Sessions of San Joaquin County.

This was an indictment and conviction for the crime of perjury. The defendant executed his promissory note to one Michael O'Hear for five hundred dollars, upon which suit was brought in the Fifth District Court, and a copy of the note was set out in the complaint. In his answer, which was verified, the defendant stated that the note set out in the complaint was not his note—that the defendant admitted that about the date of the note sued on, he made a note for five hundred dollars to the plaintiff, but that note the defendant was confident, and so charged the truth to be, was not "for value received," and so the defendant denied the note set out in the complaint of the plaintiff. The defendant demurred to the indictment, which was overruled by the Court, a trial and conviction had, and defendant appealed to this Court.

Baine & Bouldin, for Appellant.

In analyzing the answer of the defendant, on which the charge of perjury is founded by the indictment in this case, we must distinguish between the facts stated by the defendant in the answer, and the logical conclusions which he deduces from the facts.

And it is wholly immaterial in what part of his answer he places his conclusions. He may place them first or last, or both first and last. What we have to do is accurately to discriminate between fact and conclusion. If we do so, we shall find that the only fact stated by the defendant, in his answer, on which the perjury is assigned is the averment that he was "confident that the words 'value received' were not in the note when he made it."

Keeping this preliminary observation in view throughout the entire discussion, as well of the sufficiency of the indictment as *the other points, we now proceed to the demur- [289] rer interposed to the indictment in this case.

The demurrer to the indictment ought to have been sustained, and the Court erred in not sustaining it.

The indictment is founded on the oath of the defendant, taken in his answer to a suit against him (by O'Hear), on a promissory note. And the only fact sworn to in the answer, upon which the perjury is assigned, is the assertion of the said defendant that "he was confident the words 'value received,' were not in the note (on which he was sued), when he made it."

Now, in testing the indictment, we must discriminate between the fact, in the answer on which the perjury is assigned, and the logic of the indictment. The fact asserted by the defendant was that "he was confident that the words 'value received' were not in the note when he made it." The indictment's logic is, that these words were material in the note; and that if willfully false, it was perjury to make the statement.

There can be no doubt but the fact affirmed or denied must be material. (4 Blackstone, [side,] 137; Wharton Cr. Law, 655-6; Roscoe Cr. Ev. 819; Archbold's Cr. Pl. 647; 1 Term R. 69.)

If the issue itself be immaterial, then it is not perjury. (Wharton Cr. Law, 656; Roscoe Cr. Ev. 817; Archbold Cr. Pl. 674; 1 Sme. & M. 149; 4 Blackstone, [side,] 137-8; 5 U. S. Dig. p. 510, sec. 41.)

The words "confidently believes," present an immaterial issue. (1 Cal. 361.)

On a question of perjury, the materiality of the facts is a question of law. (Wharton Cr. Law, 656; 5 U. S. Dig. p. 519, secs. 3, 4.)

Then, what was the issue, in the case of *O'Hear v. McDermott*, between the parties? Simply the fact whether the words "value received" were in the note on which the defendant was sued.

The question then recurs, were these words material in the note? or are they material, in any case, to the validity of a note?

They are words the law always implies, and hence not material. (1 Greenleaf's Ev. sec. 567.)

Every book upon the subject of promissory notes says they are not material. (2 Blackstone, [side,] 445-6; 3 Kent, [side,] 78; Chitty, Jr. on Bills, 22; referring to page nine, and with part of a bill. Story on Pro. notes, sec. [entire] 51; Bailey on

Bills, 40; *Id.* same page, note 83—see this last note 83, especially.)

“Value received” need not be stated in pleading. (*Bailey on Bills*, 390; *Byles on Bills*, No. 48 Law Library, [side,] 47; *Chitty*, Sr. large work, [side,] 69; *Id.* [side,] 160.)

Upon these, containing the unbroken current of the [290] law, from *the earliest times, we confidently expect this Court will reverse the judgment below overruling the demurrer.

W. T. Wallace, Attorney-General, for Respondent.

I admit, that the fact sworn to must be material in the cause, otherwise perjury can not be predicated on the oath; but I submit, that the fact as to whether it was McDermott's note which was sued upon was a most material fact, and that McDermott swore most positively that it was not; so that there can not be a doubt as to the materiality of the fact which he swore to. Even if the words “confidently believe,” do present an immaterial issue, the words “the note which is set out in the complaint is not his note,” present a very material issue. The word “belief,” too, is now considered an absolute term, contrary to the old doctrine that it was necessary to swear absolutely and directly. (*Wheeler's Amer. Com. Law*, vol. 7, p. 306, note.)

The attorney who drew this plea, and tried it in the District Court as presenting a material issue, and who now contends that the plea amounted to nothing, was offered as a witness to prove that the prisoner only meant to swear that the note did not contain the words “value received;” this evidence the Court very properly rejected—the affidavit alone would show what the prisoner did swear to, in point of fact—it would be dangerous in the extreme, to allow a party to adduce evidence, (not to show that there was a mistake in writing the affidavit, or that a fraud was practiced upon him,) but to show that although he signed the affidavit, and swore untruly to a certain statement contained therein, yet that the meaning and effect of his oath was, in point of fact, different in his intention from what the law most conclusively affixes to it—for instance—he swears that it is “not his note;” now the legal effect of that is, that he swears that he never entered into such a contract as that sued on—that he really did not sign the note—or that it has been altered to his injury in some material particular.

“It will be dangerous, if they are to escape punishment who rashly and obstinately persist in a false oath, in a matter of which they will not take pains to inform themselves.” (*Com. v. Cornish*, 6 Binn. 2, 9; cited in 7 *Wheeler's Amer. Com. Law*, 300, 301.)

BURNETT, J, after stating the facts, delivered the opinion of the Court—FIELD, J., concurring.

The only question necessary to be determined is, whether the

oath taken by defendant was material to the issue. The rule is well established, that the false oath must be material to the issue, and, therefore, prejudicial to some one, otherwise, however willful, it cannot be perjury.

Taking the whole of the answer of defendant together, it *is plain that he predicated his denial that the note set [291] out in the complaint was not his note, upon the ground, that the note given by him did not contain the words "for value received." Had the defendant simply stated that the note sued on was not his note, it would have presented a very different case. But, after stating that it was not his note, he gives the reason, and then draws his conclusion. The alleged reason given, if true, would not change the legal effect of the note. Conceding that the words "for value received," were not in the note executed by defendant, still the instrument would have had the same legal effect. (Story on Prom. Notes, Sec. 51; 3 Kent, 78; Chitty on Bills, 68, 69.)

The demurrer should have been sustained.

Judgment reversed, and the defendant discharged.

WINANS ET AL. v. HARDENBERGH ET AL.

ERRORS, HOW CURED.—A failure on the part of a plaintiff to make out his case, and error in the Court in refusing to instruct the jury as in case of nonsuit, can be cured by the testimony of the defense.

APPEAL from the District Court of the Sixth Judicial District.

Winans & Hyer, in the Court below, sued Hardenbergh & Henarie on their promissory note. The defense, on the part of Hardenbergh, the only defendant who answered, was that the note had been given by his co-defendant, Henarie, after the dissolution of the co-partnership. On the trial, the plaintiffs, deeming the execution of the note admitted, introduced it in evidence, and after proving the amount of interest that had accrued thereon, rested their case. Whereupon defendants' counsel moved the Court to instruct the jury as in case of nonsuit. This motion was overruled. The defendant, Hardenbergh, then called Henarie as a witness, who testified that the firm of Hardenbergh & Henarie had never been formally dissolved, and that the note was given for a firm-debt due plaintiffs.

Judgment for plaintiffs. Defendants moved for a new trial, which being denied, they appealed.

W. S. Long, for Appellants.

The Court ought to have instructed the jury as in a nonsuit, because the action was against Hardenbergh & Henarie, as co-partners, and plaintiffs could not recover until they established the fact that they were co-partners at the time of the execution of the note, which they failed to do.

The Court erred in its instructions.

[292] *The verdict of the jury was contrary to the testimony in this: That it is shown that plaintiffs were the attorneys of defendants, and drew up the bill of sale from defendants to Bidleman, and consequently had full notice of the dissolution of the partnership, and it is also shown that the note is antedated, so as to make it go behind the date of the dissolution, and after the dissolution neither partner has a right to give a note in the name of the partnership. The note is joint, and the judgment should have been against both.

The judgment is for a larger sum than is prayed for in the complaint.

George Cadwalader, for Respondents.

The complaint, in this cause, alleges that on the 13th of August, 1853, the firm of Hardenbergh & Henarie, for a valuable consideration, made and delivered to Winans & Hyer, their certain promissory note, payable two days after date, for the sum of fifteen hundred dollars; and that, although payment of the note has been demanded of the makers thereof, the same has not been paid, in whole or part. A copy of the note is set out in the complaint.

In this action the appellant, Hardenbergh, filed his separate answer, which, we contend, is purely frivolous, in every particular: First, because it fails to deny a material allegation of the complaint; and second, had Hardenbergh, on the trial below, proved all that his answer contained, it would not then have presented any defense to the action. (9 How. 45, 150; 5 Id. 247; 8 Id. 149.)

If we are correct in this, an issue has never been presented by the pleadings, and the trial of this cause in the Court below was the mere determination of Hardenbergh's hypothesis, that he did not know of a greater indebtedness from Hardenbergh & Henarie to Winans & Hyer, than the sum of seven hundred dollars. However, assuming, for the sake of argument, that the objection that an answer is frivolous, cannot be raised for the first time in an Appellate Court, there was not a particle of evidence that went to sustain the belief that appellant did not owe this sum to Winans & Hyer, although the Court below permitted (as we think erroneously) the introduction of D. V. B. Henarie as a witness in behalf of his co-obligor and co-defendant, Hardenbergh, whose testimony is, in every particular, favorable to our cause.

The record discloses but one objection saved by the appellant in the Court below. It is this: After the introduction of the note, in evidence, counsel for defendant moved the Court to instruct the jury, "as in case of nonsuit."

The Court's refusal was correct; the facts did not warrant it, the law does not recognize such an instruction.

[293] *If defendant desired a nonsuit, he should have asked for it properly. Whether a nonsuit should be granted or refused, is a question for the Court to decide, and with which

the jury have nothing to do. It is also a matter of discretion with the Court, and such orders are not reviewed in Appellate Courts, without the abuse of such discretion, has been gross. (12 Barb. 108.)

The only ground for the nonsuit was, that the execution of the note, and the partnership between Hardenbergh and Henarie, was not proved. Our answer to this is, that the answer admitted both facts. (Pr. Act, Secs. 53 and 66.)

Again, admitting that the Court erred in refusing the nonsuit, the testimony of Henarie shows the execution of the note, and the existing partnership, thereby curing the error of which appellant complains. (*Smith v. Compton*, 6 Cal. 24.)

The nonsuit was properly refused, because the answer admits an indebtedness of seven hundred dollars, for which amount we were entitled to judgment upon the pleadings alone.

In conclusion, the case has been fully and fairly tried in the Court below, appellant having had every opportunity of weighing this claim in his own balances, assisted by his copartner as his principal witness. That the result could have been different, is hard to imagine; or an appeal, more naked in its character, or more audacious in its supplication to the revisory power of this Court; would be hard to discover from the multitude of cases brought before this Court.

TERRY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

The only exception taken by appellant in the Court below, was to the refusal of the Court to instruct the jury, as in case of nonsuit, upon the close of the plaintiff's testimony. If this were an error, it was cured by the introduction of evidence on the part of defendants, which supplied every omission in plaintiff's case, and conclusively established his right to recover. (*Smith v. Compton*, 6 Cal. 24.) The appeal is without merit, and was evidently taken for delay.

Judgment affirmed, with ten per cent. damages and costs.

*CHAPIN v. BOURNE.

[294]

ALCALDE GRANTS, WHEN VOID.—Alcalde grants of beach and water-lots in San Francisco, not recorded on or before the 3d of April, 1850, in some book of record, in the possession and under the control of the recorder of San Francisco, are void.

STATE LANDS, WATER-PROPERTY.—On the formation of this State, the title to water-property passed to this State.

SAN FRANCISCO BEACH AND WATER-LOT ACT.—The act of the 26th of March, 1851, granted to the city of San Francisco, certain beach and water-lot property in San Francisco, for ninety-nine years. The sale to defendant of a portion thereof, by the State Board of Land Commissioners, under the act of May 18, 1853, passed nothing but the State reversionary interest.

IDEM.—NOT AFFECTED BY ALCALDE GRANTS.—The Leavenworth alcalde grants could not pass title, or affect the beach and water-lot property of San

Francisco, except as far as conceded by the act of March 26, 1851, and upon a compliance with the requisitions thereof.

NEW TRIAL, WHEN MAY BE REFUSED.—It is not error in the Court below to refuse a new trial, provided the successful party will consent to a reduction of his judgment.

APPEAL from the Superior Court of the City of San Francisco.

This was an action of ejectment, brought to recover a lot in San Francisco, situated within the line of what is known as beach and water-lot property. On the trial, the plaintiff introduced in evidence a certified copy of a grant from T. M. Leavenworth, former alcalde of San Francisco, to W. C. Parker, (the loss of the original having been established) and sundry *mesne* conveyances from Parker to himself; he also established a continuous possession and occupation of said Parker and his grantees, down to the time of his eviction by the defendant.

The defendant relied upon a deed from the Board of Land Commissioners, made in pursuance of the act of May 18, 1853.

The jury before whom the case was tried, brought in a verdict for five hundred dollars damages, in addition to finding generally for the plaintiff. On the hearing of the motion for a new trial, made by defendant, the Court ordered that without plaintiff consented to remit two hundred and fifty dollars of the damages recovered, a new trial would be granted. This plaintiff did, and the defendant took this appeal from the judgment and the order denying the new trial.

Stow & Brown, for Appellant.

The grant under which plaintiff claims, does not come within the Water-Lot Act of 1851, in this that it does not appear to have been recorded in a book in the recorder's office, as required by the statute.

The certificates of the notaries to the *mesne* conveyance are insufficient to pass the title.

The proofs show that defendant's tenant was in possession of a part of the lot, if so, the action should have been against him.

The Court below erred in granting a new trial conditionally.

The title of Bourne to the lot in question appears to be paramount from the record.

[295] **H. S. Love*, for Respondents.

The plaintiff was entitled to recover, on the ground of prior possession of the premises, in the grantors of the plaintiff.

The lot in question, is a part of the land known as the "Beach and Water-Lots." These lots were granted to the city of San Francisco, by the act of March 26, 1851, for the term of ninety-nine years, excepting all lands sold by authority of the *ayuntamiento*, or town or city council—or which have been granted by any alcalde, and registered or recorded in some book of record, now in the office or custody or control of the recorder of the county of San Francisco, prior to the third of April, 1850. (Sess. Laws, 1851, p. 809, Sec. 2.)

The grant from Leavenworth to Parker, was filed with the clerk of the county of San Francisco, and recorded.

The word "recorder," in the act, must have been intended for "clerk," and a thing within the intention of the act, is within its meaning, as much as if within its letter.

The original grant was proved to have been lost, and a certified copy was properly admitted in evidence. (See Sec. 3 of same act, p. 309, Laws of 1851.)

But if the Court should be of the opinion that the grant was not properly recorded, yet the title being originally in the State, was by the act of March 26, 1851, transferred to the city of San Francisco. If so, the defendant, by virtue of his deed from the "State Land Commissioners," only required the right to the possession of the lot, after the expiration of ninety-nine years, from March, 1851. (See act authorizing sale water lots—Laws of 1858, p. 210, et. seq.) In taking possession of the lot, therefore, he was a mere trespasser.

This Court has frequently decided, that a party can recover on the ground of prior possession, as against a trespasser, and without showing title in himself. (*McCarren v. O'Connell*, Jan. T. 1857; *Winans v. Christy*, 4 Cal. 70.)

Title in a third person will not prevail, as against a mere trespasser, without connecting himself with that title. (See *Winans v. Christy*, above cited.)

TERRY, C. J., after stating the facts, delivered the opinion of the Court—BURNETT, J., concurring.

The defendant relies upon a deed executed by the Board of Land Commissioners, by virtue of an act passed May 18th, 1853. At the time when Leavenworth made the grant to Parker, the pueblo of San Francisco had no title whatever to the water property: it belonged to the United States, who held it in trust for any new State that might be erected out of said territory, and passed to the State of California on her admission, by virtue of her sovereignty. The grant was therefore a nullity. On the 26th of March, 1851, the Legislature passed an act granting to the city of San Francisco, for the term of ninety- [296] nine years, certain property known as the beach and water-lot property, of which this is a part. The act contained a reservation, in favor of those claiming under alcalde grants and city sales. Such titles were confirmed to the then holders, provided such conveyances were registered or recorded in some book of record on or before the 3d day of April, 1850, which book was in the possession and under the control of the recorder of San Francisco, at the date of the passage of the act.

There is no evidence that the grant to Parker was ever so recorded. A copy of the petition and grant was admitted in evidence, certified by John E. Addison, county clerk, on the 7th of June, 1850, to be a correct copy of the original record at that time in his office.

The law requires, that the grant should be recorded in a book

in the recorder's office, or a book kept by and under the control of the recorder, and not of the county clerk. But even if there were some mistake about this, the certificate does not state that such grant was of record on the 3d of April, 1850.

It may very well be, that the original grant was on the record in the county clerk's office, at the date of the certificate, and still not recorded at the time and in the mode pointed out by the statute. The plaintiff having failed to make out a title under the Water-Lot Act, is driven to his prior possession, which is sufficiently established to enable him to recover, unless the deed executed to defendant, by the San Francisco Land Commissioners should be held valid.

The Water-Lot Act, gives to the city all the lands within certain boundaries, except such as have been granted or sold in a certain manner. The grant of the lot in question, not having been recorded as required, it necessarily follows that it passed to the city, and that the Commissioners had no power to sell any other than the reversionary interest of the State.

It is urged, that the testimony shows that the defendant's tenant is in possession of a part of the property, and that he should have been joined. The record discloses the fact, that the defendant was in possession of the entire property at the commencement of the suit; even if he was not, the objection comes too late, after having come in and defended, he cannot complain of the judgment. Whether his tenant can be dispossessed without having been made a party, is a question with which he has no concern.

The Court below had a perfect right to require the plaintiff to remit a portion of the damages. It has been repeatedly held, that this power was within the discretion of the Court, and its exercise has been encouraged.

Judgment affirmed.

[297]

*HAIGHT ET AL. v. GAY ET AL.

APPEAL.—POWER OF LEGISLATURE.—The legislature has not the power to impair or take away the appellate jurisdiction of this Court, but it has the power to prescribe the mode in which appeals may be taken.

¹ **IDEM.—REMEDY, WHEN EXCLUSIVE.**—In all cases where an appeal is given by the statute, that remedy is exclusive and must be pursued.

² **WRIT OF ERROR, WHEN IT LIES.**—A writ of error will only lie in cases where no appeal is given by the act of our Legislature.

APPEAL.—REINSTATEMENT OF CASE.—This Court has the power, under its rules, to reinstate cases which have been dismissed at a previous term.

IDEM.—MOTION FOR.—A motion for such relief will only be entertained upon a proper showing, and after due notice to respondent

On error; motion to quash the writ.

1. Cited, *Noland v. Vaughn*, 9 Cal. 52. Appeal to be taken within one year, cited, *Miliken v. Huber*, 21 Cal. 169.

2. Approved, *Sacramento P. & N. E. R. Co. v. Harlan*, 24 Cal. 336.

WRIT OF ERROR to the District-Court of the Eleventh Judicial District, County of Placer.

This case was tried in the District Court of the Eleventh Judicial District, and judgment had on the 30th of October, 1856, from which defendants appealed to this Court. The appeal was perfected February 5th, 1857, and dismissed at the last April Term of this Court. At the last July Term, defendants moved to reinstate the case upon the calendar, which motion was overruled. They then sued out a writ of error, and plaintiffs now move to quash the writ, upon the ground that it was irregularly and improvidently issued.

L. Sanders, Jr., for Plaintiffs in Error.

This motion is based upon the statement that an appeal had been taken and had been dismissed by this Court. A motion had been made to reinstate the cause, but denied because the record of the appeal was never filed in this Court. It was lodged by the party with the clerk, the Court having refused to permit its being filed on motion to reinstate. See order dismissing, etc. Afterward, a writ of error was sued out, which is now sought to be set aside, because the appeal was dismissed, on the Clerk's certificate that the record had not been made out, etc.

The statute defines the steps to be taken upon an appeal. This Court has adopted rules to govern parties as to the time when, etc., the record upon the appeal shall be filed; if not filed, the appeal may be dismissed, which, if not reinstated during the term of dismissal, shall be final and a bar to any other appeal in the same case. (Rule 4.)

Forfeitures of right are not favored, and as the rule, in terms only, speaks of appeals, it cannot be construed to apply to writs of error, which is a distinct remedy, authorized by the general powers of the jurisdiction of this Court, both by the Constitution and law, and especially by the forty-fifth rule, which reads: "A writ of error shall be issued by the clerk of [298] this Court upon the filing with him of an affidavit, by, or in behalf, of the party applying for a writ showing that there is a judgment to be reviewed, describing it, and also that there is a proper case for the issuing of a writ."

Now, if the rule meant more than it contains, it would have been expressed, or embraced by an exception, of all causes where an appeal had been taken and dismissed upon a hearing upon the merits.

The mode, extent, nature, and effect of an appeal, is different and more extensive than that of a writ of error.

The "Appeal" is a matter of right which the law gives to the party. The latter is granted upon an application supported by affidavit to the complaining party on questions of law only. It is limited to one year by rule of Court.

I can find no precedent, or adjudged case, where an appeal, tried upon its merits, or otherwise, has ever been plead in bar

in the prosecution of a writ of error. But I have no doubt that upon a showing that the appeal was disposed of upon its merits as to the same errors, the Court upon such a plea, would bar the writ.

But I found a case that fits the one at bar. In the case of *Yell v. Outlaw*, (14 Ark. 1 Barb. 413,) it was held: "An appeal taken in the Circuit Court, without stay of execution, even when such appeal has been prosecuted and is pending in the Supreme Court, down to hearing and submission, will not bar the suing out subsequently a writ of error to the same judgment." (See U. S. Digest. vol. 15, p. 235, Sec. 24.)

There is no law, or rule of Court, requiring a bond in the prosecution of a writ of error, save only when it is designed to operate as a stay of execution, which was not made here. The fact is, the property of Gay & Co. was sold before the appeal was dismissed, and the dismissal sought to defeat their remedy.

But if a bond is necessary, the plaintiffs in error will execute it upon a rule to do so.

Upon the foregoing views, we insist that the plaintiff's motion be denied, and that the plaintiffs in error be allowed to prosecute their suit.

C. J. Hillyer, for Defendants in Error.

The question is, whether after an appeal has been perfected, and owing to the neglect of appellant, has been dismissed, he can afterwards prosecute a writ of error to review the same alleged errors.

Section three hundred and thirty-three of the Practice Act is in these words:

"A judgment or order in a civil action, except when [299] expressly *made final by this act, may be reviewed as presented by this title, and not otherwise."

There is nothing in the Constitution preventing the Legislature from limiting the mode of review as they might think proper. (Const., Art. VI., Sec. 4.)

It is difficult to perceive how, in any case, a writ of error will lie, without directly infringing this statute.

The section above quoted, and the forty-fifth rule of the Supreme Court can only be reconciled by considering the writ of error and appeal as identical. If so, when a party has lost his right to appeal, he has forfeited his right to a writ of error.

The object of rule fourth of this Court, was to enforce diligence upon those parties who were protracting litigation by removing a cause to this Court.

This object would be totally defeated if this writ can be sustained. If a party can first appeal, thus causing a delay till the next term of this Court, put the respondent to the trouble of procuring a certificate, and moving this Court for a dismissal, (in all which proceeding the appellant does not become chargeable with one cent of costs,) and afterwards commence proceedings anew by a writ of error, to procure a review of the same

alleged errors, then the rule referred to is worse than nugatory. It furnishes a convenient instrument to an obstinate litigant with which to increase the trouble and expense of his adversary.

After the dismissal of the appeal, the party has still the right to move that it be reinstated, and the Court will grant the motion if he can show himself not in fault.

In this case, the dismissal was ordered in the first week of the April term. Had the dismissal been in any way unjust to appellants, he had full opportunity to have shown the fact to this Court, and secured the reinstatement of the case.

Rule forty-eight of this Court, it is believed, precludes a party from escaping the consequence of his negligence on an appeal by resorting to a writ of error, which is to be governed by the same rules.

No cases precisely in point can be found, but those below cited establish this.

When a statutory remedy is given to a party dissatisfied with the judgment of an inferior Court, the common law remedy is taken away, except in cases when, without any negligence, the party is not able to avail himself of the statutory remedy. (*Savage v. Gulliver*, 4 Mass. 177; *Jarvis v. Blanchard*, 6 Mass. 4; *Cook v. Hoyt*, 13 Ill. 144; *White v. Ferye*, 2 Gil. 65.)

The case presents stronger objections to the allowance of the writ than any above, in this, that our statute expressly denies the writ, and also, that the rules of this Court gave to the appellant the opportunity of excusing his delay and [300] having the appeal reinstated.

BURNETT, J., after stating the facts, delivered the opinion of the Court—TERRY, C. J., concurring.

The appellate power of the Supreme Court is given by the fourth section of the sixth article of the Constitution, which expressly empowers this Court to issue all writs and process necessary to the exercise of its appellate jurisdiction. The Legislature, therefore, can pass no Act impairing the exercise of this appellate power.

But while the Legislature cannot substantially impair the right of appeal, it is certainly competent to regulate the mere mode in which this right must be asserted. The Constitution only empowers this Court to issue such writs and process as may be necessary to the exercise of its appellate jurisdiction; if this appellate jurisdiction can be exercised without this process, then it cannot be necessary, and should not be issued.

In the case of *Savage v. Gulliver*, 4 Mass. 177, it was said that "the statute, in giving an appeal, has, in our opinion, taken away by a reasonable implication, the remedy by error, unless in cases where the aggrieved party, without laches on his part, could not avail himself of an appeal." (See also, 6 Mass. 4; 2 Gil. 65; 13 Ill. 144.)

But the construction of our Practice Act is not left to rest upon reasonable implication. The ninth title of the Act re-

lates exclusively to appeals, and the three hundred and thirty-third section provides that "a judgment or order in a civil action, except when expressly made final by the Act, may be reviewed as prescribed by this title, and not otherwise."

This provision is plain and positive, that a judgment or order, may be received as prescribed by that title, and not otherwise. If, therefore, an appeal be given by that title in a particular case, the judgment or order can only be reviewed in the manner therein prescribed. In reference to cases where no appeal is given, this negative provision, "not otherwise," need not apply.

Our conclusion is that in all cases where an appeal is given by the statute, that remedy is exclusive and must be pursued, and that a writ of error will only lie in cases where no appeal is given by the Act. If, from any excusable cause, the party has been prevented from prosecuting his appeal, his remedy is by motion to reinstate the case. And if he has been prevented from making this motion at the same term of the Court at which the appeal was dismissed, he may, upon a proper showing, and after due notice to the respondent, make the motion at a subsequent term. The rules of this Court are always under its control, and their application may be enlarged in special cases.

Motion sustained.

[301]

***PEOPLE v. McCALLA ET AL.**

CRIMINAL LAW, RIGHT TO SEPARATE TRIAL.—A defendant, in a joint-indictment, has the right to demand a separate trial, or to waive this right, and be tried jointly.

IDEM.—SEVERANCE OF CHALLENGES.—Where several defendants are tried together, they are not allowed to sever their challenges, but all must join therein. This applies as well to peremptory, as to challenges for cause.

APPEAL from the District Court of the Fifth Judicial District, County of Tuolumné.

Edward McCalla, Thomas McCalla, and W. H. Killion, were indicted for the murder of one Bond. On being arraigned, they elected to be tried jointly. Upon the trial of this cause, and after James Campbell, one of the persons who was called as a juror, had been examined touching his competency, the said Edward McCalla interposed a peremptory challenge to said juror, before twenty peremptory challenges had been exhausted; whereupon, Thomas McCalla objected to said challenge being allowed, and refused to join therein. The Court refused to allow the challenge, and the juror was sworn.

Afterwards, and before twenty peremptory challenges had been exhausted by the defense, the defendant Thomas McCalla challenged, peremptorily, a juror, and the said Edward McCalla refused to join therein. This juror was also admitted by the Court. To the ruling of the Court, in both instances, the said Edward and Thomas McCalla excepted.

The jury found Edward McCalla guilty of murder in the first degree, Thomas McCalla guilty of manslaughter, and acquitted W. H. Killion.

Thomas and Edward McCalla took this appeal.

E. D. Baker, for Appellants.

It cannot admit of reasonable doubt, that the Court in this case ruled erroneously, as to the allowance of the challenge.

"Where several defendants are tried together, they are not allowed to sever their challenges, but must join therein." (C. L., p. 464, Sec. 327.)

But this section is to be construed with sections three hundred and forty-two and three hundred and forty-three:

Section 342 declares "A peremptory challenge may be taken by either party, and may be oral. It is an objection to a juror, for which no reason need be given, but upon which the Court shall exclude him."

Section 343. "If the offense charged be punishable with death, or with imprisonment in a State-prison for life, the defendant is entitled to twenty, and the State to five, peremptory challenges."

*The act is, therefore, peremptory, that each defendant [302] charged with so high an offense as the one in this case, shall have twenty challenges. It is, therefore, obvious, that section three hundred and twenty-seven relates to challenges for cause, not to peremptory challenges.

In this case, it appears that the peremptory challenges were not exhausted when the Court ruled that they must join, or the challenge be disallowed, as it was, because one of the defendants would not join.

As the defendant urging his peremptory challenges had not exhausted his peremptory challenges, the effect of the decision was to deprive him of a challenge allowed him by law, which may have resulted in his own conviction. If the ruling of the Court was right, the practical effect of it might be, where two defendants are tried together, to reduce the number of peremptory challenges to ten, clearly a result never contemplated by the Legislature. Such a forced construction should not be adopted against life and liberty. A juror might be presented whose prejudices would lead him to convict one defendant and acquit the other, and yet the party challenging be entirely deprived of the benefit of his peremptory challenge, under the construction in this case.

The Constitution of the United States, and of this State, secures to the accused a right of trial by jury, and it has been frequently decided, that the jury trial is to be determined and governed by the principles of the common law, as they existed at the period of the adoption of those provisions. Blackstone informs us that the number of peremptory challenges, at common law, was thirty-five. (3 Black. 354.)

As the common law stood, amended by statute Henry VIII.,

at the time of the adoption of the Federal Constitution, and also that of the Constitution of this State, the number was twenty.

We submit, therefore, that in capital cases, the Legislature has no right to reduce the number below twenty. (1 Kent, 522, and note; *State v. Simons*, 2 Spicer, 767; *Byrd v. The State*, 1 How. 177.)

Whether or not the Legislature possesses the power to reduce the number of challenges below twenty, it should not be held to have been done by construction.

W. T. Wallace, Attorney-General, for Respondent.

No brief on file.

TERRY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

The defendants were jointly indicted, and tried, in the Court below, for the crime of murder, and were convicted, the one of murder, and the other of manslaughter.

[303] *The only error assigned, is the refusal of the Court to exclude from the panel a juror, who was challenged peremptorily by one of the defendants, the other expressly refusing to join in the challenge.

The three hundred and twenty-seventh section of the act to regulate proceedings in criminal cases, provides that "when several defendants are tried together, they are not allowed to sever their challenges, but must join therein." This section would appear to be sufficiently explicit, and, indeed, it would be difficult to find language to express more clearly the intention of the Legislature.

It is contended by counsel that it was intended to apply only to challenges for cause, and that each defendant, in a criminal case, is entitled to twenty peremptory challenges. In support of this position no authority is adduced, and the reverse of it would seem to be true. Challenges for cause may be made by any party, and when a fact establishing the incompetence of a juror is brought to the knowledge of the Court, it becomes its duty to exclude him, even against the wishes of all the parties.

On the other hand, peremptory challenges are interposed at the option of the defense, or the prosecution, and each defendant has a right to insist that the limit allowed to the prosecution is not exceeded, and that he shall not be deprived of the judgment of a competent and impartial juror, by the mere whim or caprice of his co-defendant.

Defendants in capital cases are allowed twenty peremptory challenges, (*Id.* Sec. 343,) and it is at the option of each defendant, in a joint-indictment, to receive a separate trial. (Sec. 367.) If he chooses to waive this right, and be tried jointly with another, his authority to control the conduct of the defense is of course shared with his co-defendant. It follows that there is no error in the ruling of the Court below.

The judgment is affirmed, and the Court below directed to appoint a day for carrying its sentence into execution.

PLACER COUNTY v. ASTIN ET AL.

AGENT ESTOPPED TO DENY RIGHT OF PRINCIPAL.—Where the sheriff, as *ex-officio* tax-collector, received taxes, and afterwards, on being sued therefor, denied the right of the county to recover the same from him, because the same had been illegally levied by the Court of Sessions: *Held*, that although the Court of Sessions had no power to levy taxes, yet the defendant, being the agent or trustee of the county, was estopped from denying the right of the county to recover.

COUNTIES AS PARTIES TO ACTIONS.—Under the act of April, 1854, counties have the right of prosecuting and defending actions in the same manner as individuals.

APPEAL from the District Court of the Eleventh Judicial District, County of Placer.

*Placer county sued Samuel Astin, and his bondsmen, [304] and for cause thereof proved that Astin, as tax-collector, had received a large sum of money, which he had failed to pay over. The principal defense was that the taxes for that year had been illegally levied by the Court of Sessions, and that he, as tax-collector, would be responsible to the tax-payers for the amount thereof.

Judgment for plaintiff. Defendants moved for a new trial, which being denied, they appealed.

Myers & Hopkins, for Appellants.

Placer county had no legal capacity to sue, and was improperly made plaintiff. (*Hunsacker v. Borden*, decided in this Court at the July term, 1855; *Bos v. Seaman*.)

The revenue laws of 1854, gave one cause of action against a sheriff, for refusing or neglecting to make return and settlement with the proper officers, and another for neglecting to pay, etc. (Id. Secs. 97, 110.)

The Court of Sessions had no power to levy taxes or revenue in any case—hence, there was no legal assessment of taxes for county purposes for said county. (Article III of the Constitution of the State of California; Section 8 of Article VI of the same; *Burgoyne v. Board of Supervisors of San Francisco*, 5 Cal. 9; *Phelan v. City of San Francisco*, 6 Cal. 531.)

The plaintiff is neither legally nor equitably entitled to the money claimed in the action, and the tax-payers may compel its repayment to them.

M. E. Mills, District Attorney, for Respondent.

As to the capacity of a county to sue, the statute expressly gives the authority. (See also *McCann v. Sierra County*, Jan. T. 1857.)

The action is brought upon the bond of the officer. But one cause of action is stated. Any number of breaches of the condition might be assigned in complaint.

As to the power of the Court of Sessions to levy the property tax, whether the Court had the power or not, will make no difference in this case.

The complaint charges, and the evidence shows, that Astin received the assessment-roll and collected the taxes as sheriff, and refused to pay the money to the officers of the county for her benefit.

He cannot now say that the tax was illegal. This is a question between the county and her tax-paying citizens. If the tax was illegal, the tax-payers might have objected to paying. There is nothing to show but that the taxes were paid voluntarily. In that event, the sheriff could not be liable to refund. If so paid, the money belonged to the county, and the sheriff is liable for not paying it over.

[305] *When the money was collected, that portion which had been levied for county purposes, belonged to the county; she is plainly the party in interest, and the proper party to sue.

Under our statute in regard to parties, the money could be recovered by no other plaintiff.

TERRY, J., delivered the opinion of the Court—BURNETT, J., concurring.

This was an action on an official bond, instituted to recover a certain sum collected by Astin, as sheriff and *ex officio* tax collector of Placer county, and which he failed to pay over to the county treasurer, as required by law. A jury being waived, the case was tried by the Court, who found that defendant, Astin, was duly elected and qualified as sheriff of Placer county.. That the bond sued on was duly executed by the defendants. The Court also found the amount of taxes assessed, and amount collected by Astin, and that after deducting the sum paid into the treasury, and the per centage allowed to the collector, there yet remained in his hands, of the funds so collected as taxes, due the plaintiff, the sum of one thousand three hundred and ninety dollars, for which a judgment was rendered.

The appellant contends—

First, that the plaintiff has no legal capacity to sue.

This point is not tenable. The statute of April, 1854, gives to counties the right of prosecuting and defending all actions, in the same manner and with the same effect as individuals. (See Acts of 1854, p. 45; see also *Price v. Sacramento*, 6 Cal. 254; and *Gilman v. Contra Costa Co.*, 6 Cal. 676.)

The second point is, an objection to the complaint, which, not having been taken by demurrer, cannot be raised on appeal.

The other objection on which appellant seemed chiefly to rely, and to which he addressed the greater part of his argument, is, that the Court of Sessions had no power to levy taxes, or revenue, in any case; hence, there was no legal assessment of taxes for county purposes, and plaintiff is neither legally nor equitably entitled to money claimed in this action, which belongs to those persons from whom defendant, Astin, received it.

There is no doubt of the correctness of this proposition, but the defendant is not in a condition to avail himself of it; having collected the money as the agent, or trustee, of the plaintiff, he cannot deny the right of his principal to receive it.

Judgment affirmed, with costs.

ADAMS v. WOODS ET AL., IN RE THE PETITION OF [306] STANLY.

APPEAL, WHO MAY.—A party aggrieved by a judgment has a right of appeal, though he is not a party to the record,

IDEM.—**PARTY AGGRIEVED, WHO IS.**—The rule in reference to writs of error, would seem, by parity of reasoning, to apply to the right of appeal; and as to the question, who is the party aggrieved, the test is found in the question—"Would the party have had the thing, if the erroneous judgment had not been given?" If yea, then he is the party aggrieved. But his right to the thing must be immediate, and not the remote consequence of the judgment, had it been differently given.

RECEIVER, MONEY IN HANDS OF.—A receiver is appointed in behalf of all the parties who may establish rights in the cause, and the money in his hands is in *custodia legis*.

IDEM.—**APPOINTMENT OF.**—In a suit for a dissolution of partnership, the appointment of a receiver is only a means to attain the end contemplated by the plaintiff; and so is the employment of counsel by the receiver.

PLEADING, CONSTRUCTION OF.—If the complaint contemplated a certain end, it equally intended the use of all the necessary means.

RECEIVER, RIGHTS OF.—A receiver having the right to stipulate with the counsel employed by him, that the counsel shall rely upon the allowance made by the Court for his services, it is the duty of the receiver to report, among his disbursements, the claim of the counsel, leaving the amount to be fixed by the Court; and if the counsel, or any other person employed by the receiver, feels aggrieved by the order of the Court thereon, he can appeal therefrom.

IDEM.—In such a case, it would only be necessary for the Court below to order the receiver to retain the amount of the disputed items; and the interest of all parties concerned is better subserved by a single appeal upon the entire allowance.

ATTORNEY AND COUNSEL, COMPENSATION.—Counsel for the plaintiff, in a suit for a dissolution, cannot claim compensation as associate counsel for the receiver.

WITNESS, ASSIGNOR INCOMPETENT.—The assignor of a claim is incompetent as a witness in favor of the claim, when his assignee is a formal party to the record, and equally so when the suit is prosecuted for the immediate benefit of his assignee, though not a party.

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

This was a suit brought by Alvin Adams against I. C. Woods and D. H. Haskell, for a dissolution of partnership, and has been before this Court in various phases, as will be seen by reference to the fifth, sixth and seventh California Reports. The present appeal is taken in the matter of the petition of Edward Stanly to the Court below for the appointment of a referee before whom his account might be presented for adjustment and allowance, The claim of the petitioner was for compen-

*See *Adams v. Woods & Haskell*, ante 152.

sation for legal services, as counsel for the receiver appointed in this suit. The Court below ordered a reference. The claim, as prosecuted before the referee, included a claim for associate counsel, the associate counsel being a firm, of which one of the members was the attorney for the plaintiff in this suit. The referee reported in favor of an allowance of sixteen thousand dollars. The Court below entered an order setting aside the report of the referee, without prejudice to another application of the petitioner in proper form. Petitioner appealed.

The sum of the testimony given before the referee, and [307] of the *other action in the case in the Court below, appears fully in the opinion of the Court.

Wm. Hayes, for Appellant.

Edward Stanly applied to the Court below, by petition, for an order appointing a referee before whom he might prove his claim against the funds in the hands of the receiver. The order was granted, and on the coming in of the report, exceptions were taken, and substantially on the grounds following:

1. On the ground that the Court had no jurisdiction to make the order, no notice having been given to the creditors of Adams & Co. that the petition had been presented.

The answer is, that notice was given to the receiver, and that comes instead of notice to the creditors, for the reason:

That they are virtually represented by him. (Story Eq. Pl., Secs. 140, 142, 148, 149, 150.)

And that to give notice to the creditors would be impossible. (Story Eq. Pl., Sec. 150.)

2. The question presented by Mr. Stanly's petition was properly a matter of "accounting," and an "accounting" can never be had at the instance of a party, but must be at the instance of the Court.

The answer is that the petition does not put the receiver upon "accounting" in any just sense of that term.

To account is to make a statement of receipts and disbursements with reference to a balance.

The petition asked for no such statement; it might have been and was fully tried and determined upon its merits before the referee, without any inquiry as to the state of the receiver's accounts.

3. The consideration of all claims on the funds in favor of third persons, that have arisen pending the litigation, should be postponed until the final accounting by the referee, and they should then be preferred by petition, and disposed of according to their several merits.

The mode suggested is the mode adopted by Mr. Stanly. He brought his claim to the notice of the Court by petition. Where property is in the hands of a receiver, a third person having claims to it, or against it, is not allowed to sue the receiver; the proper course is for the claimant to apply to the Court, upon notice to the receiver, for an order directing a delivery of the

property, or a payment of the claim out of it, as the case may be. The hearing would be before a master, where the claimant could be examined *pro interesse suo*. (Edwards on Receiver, 126, where the cases are collated.)

Nor is the mode of procedure restricted to the case above named, but applies in all cases of claims upon trust-funds over *which the chancery has acquired jurisdiction. [308] (*Matter of Heller*, 3 Paige, 199; *Matter of Hopper*, 5 Paige, 489.)

It does not, as has been supposed, follow necessarily that any injustice would be done as among the claimants—one by asking first, absorbing the funds to the prejudice of the others—for to allow a claim is one thing, to pay it is another.

If a case should arise where the equities required it, the order might be framed allowing the claim and directing its payment only in due course of administration. (Story Eq. Pl., Sec. 148.)

The three objections that have been stated and considered, go to the jurisdiction or to the regularity of the proceedings terminating in the order; but there are others that go either to rulings of the referee, the regularity of the proceedings before him, or to the merits of the claim.

It has been said that the receiver could not employ counsel without the special order of the Court.

The true rule is that he has no powers except such as are conferred upon him by the order for his appointment and the course and practice of this Court. (Ed. on Receivers, 4; 2 Paige, 452; 2 Id. 438.)

In the order appointing Naglee, he is expressly authorized to bring suit and employ counsel.

But no express authority to employ counsel is necessary. (Ed. on Receivers, 93.)

Again, it is said, it was improper for the receiver to employ counsel of the plaintiff Adams.

The answer is that Shafter & Park were not, in fact, employed by the receiver at all as his counsel.

The arrangement, as testified to by Stanly and Shafter, was substantially as follows:

Stanly was to be the sole counsel of the receiver, and everything was to be subjected to his supervision as such. But the questions to be investigated were numerous and complicated. Stanly had no acquaintance with the affairs of Adams & Co., and Shafter & Park were acquainted with them intimately. The receiver thought, and whether with reason or without is of no moment, that the interest of the creditors would be subserved by an arrangement securing their services in the litigation then in prospect. They refused to subject themselves to the receiver's counsel unless they could be compensated for it. As counsel for Adams it was doubtless their duty to look after his interests, but after the appointment of a receiver, who became such for all parties, it became his duty to initiate all proceedings for the defense, or augmentation of the fund, and to control

them thereafter. In that behalf, Adams was not bound to put himself to private charges, neither were Haskell or Woods, and the counsel of the former were no more bound to connect [309] them-selves with suits instituted by the receiver than were the counsel of the latter.

Again, the interests of Adams were not opposed to the interests represented by the receiver, and, therefore, the receiver might well arrange for the services of Shafter & Park without subjecting himself to the imputation of breach of trust.

The arrangement was that Shafter & Park should assist Mr. Stanly, he, however, being the sole and responsible counsel and adviser; and that the aggregate amount of service rendered by him in person, or by him through Shafter & Park, should be the basis of the compensation to be awarded to him by the Court. With the amount of the allowance to be made by Stanly to his subalterns, the receiver had nothing to do.

The relation of Shafter & Park to Mr. Stanly, when exactly considered, was not that of associate counsel.

The arrangement, then, was not only free from the technical objection now brought against it, but when considered in connection with the main purpose of the suit, may have been highly promotive of it in fact.

It is also said that Stanly was an interested witness, and, therefore, his testimony should be disregarded.

The report discloses that he was called by the counsel of Adams.

It is according to the chancery practise to allow a party standing in Mr. Stanly's position, to be examined *pro interesse suo*. (Edwards on Receivers, 129.)

If Stanly's testimony should be disregarded, there remains the testimony of Shafter, corroborated by Shearer and Simonds.

But it is said that Shafter was an incompetent witness, for he was the assignor of an unliquidated demand.

The answer is, that the rule that the assignor of an unliquidated demand is an incompetent witness, applies only in actions brought by the assignor. (Pr. Act, Sec. 4.)

Eugene Casserly, for Respondent.

1. The appellant is Edward Stanly, who is neither a party to the record nor the successor in interest of a party; but a mere stranger to the record, cannot prosecute an appeal.

The rule, as stated, is perfectly well settled, both in this State and elsewhere.

Montgomery v. Leavenworth, 2 Cal. 57, is not only an authority as to the general principle, but very analogous as to the facts; except that was a much stronger case in favor of the appeal than this.

To the same effect are all the authorities, ancient and modern. (3 Bac. Abridg.; "Error," "B," and the old authorities; 2 Saund., 46c, note 6; 2 Tidd's Prac. 1189; *Barr v. Stevens*, 1 Bibb, 292; *South's Heirs v. Hoy*, 3 Bibb. 522.)

*This was so at common law as to writs of error: to [310] which the last above cited authorities mainly relate.

A fortiori as to appeals, the right to which being a statutory one, must be strictly pursued. (Murdock, Appellant, etc., 7 Pick. 304; per Parker, J., 319, 320.)

Nor does the language of our statute, allowing an appeal to the "party aggrieved," Pr. Act, Sec. 335, comprehends such a case as the present. The appeal is by the same section expressly limited to "the causes prescribed by this title," which, as will be seen hereafter, do not include this case. And besides, "any party aggrieved," must necessarily mean "any party" to the record.

This is the construction placed in other States upon the same language. (*Swan v. Picquet*, 3 Pick. 443, 444; *Downing v. Porter*, 9 Mass. 386.)

The general rule of law being as has been stated, there is certainly nothing in the present case to release it from the general rule.

In this case the parties to the record are the plaintiff, Alvin Adams; the defendants, Wood & Haskell; and the creditors of the partnership; which creditors are in part represented by the receiver.

The appellant Stanly is not a party to the record. He is not one of the creditors of the partnership and has no claim against it whatever. Neither is he a party by virtue of any lien upon the fund. None but the creditors of the partnership have such a lien, and until a decree for distribution, theirs is only a *quasi* lien, or equity to be worked out through the express equitable lien of the partners. (*Ex parte Ruffin*, 6 Ves. 119; *ex parte Williams*, 11 Ves. 3, approving and affirming *en parte Ruffin*, and see per Eldon, Lord Ch., pp. 5 and 6; Story on Part., Secs. 326, 361.)

Stanly is no creditor of the partnership, and has no claim against it, nor upon the fund. His claim, if he has any, is against the receiver. But this is upon a contract and debt personal between themselves. Though the receiver is allowed to pay this debt out of the fund, like all others which he contracts in the discharge of his duties, yet he can do this only to the extent the debt is approved in passing his accounts finally before the Court. Anything beyond that he must pay out of his own pocket. Thus, a receiver may contract to pay his solicitor what he pleases for his services. But whatever his contract, the amount allowed by the Court, as just, in the passing of his accounts, and no more, can be paid out of the fund. The residue is a debt due by the receiver himself. What is allowed and thus made payable out of the fund, (to the receiver—not to his counsel,) is so because it is a fair and just expenditure incurred by the receiver for the benefit of the fund. Not at all because there is any lien *or *quasi* lien on the part of the counsel [311]—or anything bearing the remotest approach to one.

2. The order appealed from is not one from which an appeal will lie in any case.

The law-making power of this State has defined, as it has the right to do, the cases in which an appeal may be taken. These are set forth in section three hundred and thirty-six of the Civil Practice Act. As if to remove all doubt that appeals were to be confined to those cases and those only, section three hundred and thirty-three, with which "Title IX," concerning "appeals in civil actions" commences, provides, "a judgment or order in a civil action, except when expressly made final by this act, may be reviewed as prescribed by this title, and not otherwise."

The whole proceeding, on the part of the appellant, is so anomalous and unheard of, that it is difficult to describe or classify the order by which the District Court of the Fourth Judicial District has very justly turned it out of Court. It is most like an interlocutory order, and this Court has already decided that from such an order, no appeal will lie. (*Johnson v. Sepulveda*, Jan. Term, 1856.)

This always was the rule in Chancery, and there rigorously enforced. (*Buel v. Street*, 9 Johns. 443, and see, per KENT, C. J., stating the test of an appealable order to be, that it must involve a decision upon the merits of the controversy, p. 448.)

Whatever doubt there may be as to what kind of an order this is, there is none as to what it is not. It is certainly not such an order as an appeal will lie from under our laws.

2. Appellant's motion for a reference, the order of the Fourth District Court allowing it, and all the proceedings thereunder, were grossly irregular and a nullity.

It may very safely be assumed that the object of the suit of *Adams v. Woods & Haskell*, is to wind up the partnership and distribute the assets *pro rata* among the creditors. It may also be assumed, with equal safety, that in such a suit the only matters with which the Court has jurisdiction, are those which are in some way relevant to the issues involved. Such are the existence of the partnership, the necessity for its dissolution, the appointment of a receiver, the amount of the assets, and of the debts, the mode of distribution among the creditors, and the amount to be distributed to each, etc. With respect to such matters, having jurisdiction, it has all the incidents of jurisdiction, and among these the right to inform itself by references, to make orders and decrees, etc.

But beyond this its powers do not go. It cannot engage in the investigation of questions and the settlement of controversies, which, however interesting to the parties concerned [312] in them, *have no proper connection with the subject-matter of the suit. Thus, in the present case, the controversy between the appellant and the receiver, as to the measure of the former's compensation, is one which has really nothing to do with the merits of the suit of *Adams v. Woods & Has-*

kell. For the Court to engage in it is simply to go beyond its jurisdiction, and do injustice to the rightful parties to the litigation.

The receiver is an officer of the Court, intrusted with the collection, preservation, and management of the assets and the other interests of the estate committed to his care. Though he has a right to the advice and instruction of the Court in important matters which are to bind the estate, such as a lease for more than a year, (*Morris v. Elme*, 1 Ves. Jr. 139; *Doe ex dem. Marsack v. Read*, 12 East. 58,) yet as to the details of his management of the estate, and the expenditures necessary for that purpose, in employing agents, attorneys, solicitors, clerks, etc., he has a discretion which, in the nature of things he must exercise at his own risk, and that of his sureties on his official bond. Money he ought not to pay out, unless in small sums, without the order of the Court, for he does it at his peril. (*Fletcher v. Dodd*, 1 Ves. Jr. 85; *Bennet's Master's Office*, p. 98.) Whatever he pays or incurs he exhibits in his accounts. (See form of these accounts, *Bennet's Master's Office*, Appendix, 48, side paging, *Law Lib.* vol. 35.) These he passes at stated periods from time to time, and finally, before his discharge; but always upon notice to the creditors and other parties to the suit, who thus have their day in Court to investigate and canvass his accounts, item by item. (*Edwards on Receivers*, 512; *Hoffman's Master's Office*, 163; *Bennet's Master's Office*, 99, 100, side paging, *Law Lib.* 35.) And if this duty is insufficiently discharged by them, the Court of its own motion will assume it.

Then, and not otherwise, the allowances claimed by the receiver for his counsel-fees, salaries of his clerks, agents, etc., come before the Court; and if numerous, heavy, or disputed, are referred to a master to examine and report. (*Matter of Kellogg*, 7 Paige, 286.) To this inquiry all are parties—plaintiff, defendant, receiver, and the creditors of the estate. (*Bennet's Master's Office*, 100, side paging; *Edwards Rec.* 515, 552.) The receiver's solicitor is not, however, nor is his clerk, nor his agents. Upon the coming in of the master's report, the allowances claimed are rejected, or modified, or allowed in full, as may be just. (*Bank of Niagara*, 6 Paige, 213, 215, 216.) If the receiver has proper legal advice he will neither pay nor promise larger fees to his counsel than will be just; and if he is particularly prudent, he will, as the receiver did in this case, (see testimony of H. M. Naglee, referee's report, date of July 3d,) stipulate that the bulk of the compensation shall be such as the Chancellor will allow.

*If, on the contrary, he should pay, or promise, immoderate counsel-fees, neither his payments, or his promises, will be regarded by the Court in settling his accounts. The item will be fixed at what is just. If more has been paid, the receiver loses it, and must account for it to the estate. (*In re Montgomery*, 1 Molloy, 419, 12 Eng. Ch.) The receiver, in passing

his accounts, is not allowed costs of a suit erroneously brought. (Same principle, *Swaby v. Dickon*, 5 Sim. 629, 9 Eng. Ch. R.) If more has been promised, his counsel must look to him for it, and they must settle it between them by a suit at law, or compromise, as each may be advised.

If the plaintiff, defendant, the creditors of the receiver, should be dissatisfied with the allowances made by the Court upon the final settlement, they, or any of them, may undoubtedly appeal from the order, as being a special order after judgment. (Edw. Rec. 543-4.) But counsel for the receiver cannot appeal; and it was never before heard of, or suggested, that he could; his remedy, in any case, being against the receiver alone, with whom was his contract. (See *Strike's case*, 1, 57, and per Bland. Ch., at p. 98, directly in point.)

4. Upon the facts of the case, as disclosed on the reference, the claim of the appellant is without merit; and upon this ground, also, the order of the Court below was right.

The chief witnesses are the appellant, Mr. Stanley, and Mr. O. L. Shafter. Without their testimony the proof is incomplete as to the most material part of the case, the rendering of the services. They are both interested in the claim—Mr. Stanley directly in the whole, and Mr. Shafter, with his partner, Mr. Park, in one half of it, with their agreement with Mr. Stanley.

Mr. Stanley could not offer himself as a witness. Mr. Park, however, acting as counsel for Alvin Adams, calls him to establish the claim which, when collected, is to be divided between them. A more striking instance could not be presented of the great propriety of the rule that the solicitor of either party is incompetent to act for the receiver, directly or indirectly, as associate counsel.

Then, the testimony being still incomplete, Mr. O. L. Shafter is brought in to supply the *hiatus*, by the counsel for Mr. Stanley. Thus, the case of the appellant is made out by the testimony of the two men, of all the world, most disqualified by law to testify—the appellant himself, who is to receive the amount reported by the referee, and his associate counsel, who is to share it with him.

True, it is said Mr. Stanley is called as a witness by an adverse party, the plaintiff, Adams. But, in fact, the only really adverse parties were the receiver and the defendants.

It is also said that Mr. Shafter had assigned his interest and, therefore, was competent. This is not so. The assignor [314] is, by our statute, incompetent as a witness for the assignee; and it is in proof that the assignee, Mr. Hayes, is the partner of the appellant, (see testimony of O. L. Shafter, referee's report, October 8,) and, of course, interested in his claim. The motion to strike out his testimony was improperly denied by the referee.

The testimony of Messrs. Stanley and Shafter being stricken out, the claim of the appellant has nothing to stand on.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

In the matter of the petition of Edward Stanly.

In the progress of this suit the Court below, on the 12th October, 1855, appointed Henry M. Naglee as receiver, with authority to bring suits, and employ counsel. On the 29th October, 1855, the petitioner was employed as counsel by the receiver, and continued to act as such until the 10th May, 1856. The petitioner then filed his petition, praying the appointment of a referee, before whom his account might be presented, for adjustment and allowance. The Court appointed the referee, who proceeded to take testimony and make his report. The report was set aside, on motion, and the petitioner appealed to this Court.

The learned counsel for the defendants, Woods and Haskell, insists that the appeal should be dismissed, upon the grounds: First, that the appellant is no party to the record, nor the successor in interest of a party; second, that no appeal will lie from such an order.

The Constitution of this State confers upon this Court appellate power, in all cases where the amount in controversy exceeds two hundred dollars; and this appellate power having been conferred by the Constitution, cannot be taken away, or impaired, by act of the Legislature. It is within the legitimate powers of the Legislature to prescribe the mode of taking appeals, so that the appellate powers of this Court be not thereby impaired. And this Court is expressly empowered, by the Constitution, to issue all writs and processes necessary to the exercise of its appellate jurisdiction.

And, as the appellate power of this Court extends to cases like the present, the only question that can arise, regards the time and mode of invoking it. The petitioner, therefore, must have the right to the decision of this Court in some form.

By the three hundred and thirty-fifth section of the Practice Act, "any party aggrieved may appeal in cases prescribed in that title."

The only inquiry arising under this provision is, who is a "party aggrieved," in the contemplation of the statute.

In a note to the case of *William v. Gwyn*, 2 Saund., a 46, it is stated:

*"No person can bring a writ of error, unless he is a [315] party, or privy to the record, or is prejudiced by the judgment; the rule upon the subject being, that a writ of error can only be brought by him who would have had the thing, if the erroneous judgment had not been given."

And in the case of *South's Heirs v. Hay*, 3 Bibb. 523, the Chief Justice said:

"It is a general rule, that no one who is not a party, or privy to a judgment, or prejudiced thereby, can maintain a writ of error to reverse it."

So, in the case of *Swan v. Piquet*, 3 Pick. 443, it was held

that a debtor of an estate could not appeal from a decree of the Judge of Probate, granting letters of administration. The Court were of the opinion: "that under the statute, a party aggrieved must be one who is interested in the administration of the estate, and not a debtor merely." (See also 9 Mass. 385.)

The rule in reference to writs of error, would seem, by parity of reasoning, to apply to the right of appeal. And as to the question who is the party aggrieved, the test found in the note already quoted from Saunders, seems to be the most clear and simple that could be conceived. Would the party have had the thing, if the erroneous judgment had not been given? If the answer be yea, then the person is the "party aggrieved." But his right to the thing must be the immediate, and not the remote consequence of the judgment, had it been differently given.

If, then, the decision of the Court below had been in favor of Stanly, he would have been entitled to the thing in controversy, and therefore is aggrieved by the decision if erroneous.

The second ground for dismissing the appeal is, that no appeal will lie from such an order.

It would seem that the order appealed from is not one of those mentioned in the third division of section three hundred and thirty-six, from which an appeal will lie before final judgment. The order in this case, from which the appeal is taken, was a special order made after final judgment. The final decree of dissolution was rendered, in December, 1856, and the order was made in January, 1857.

The next point insisted upon by the counsel of Woods and Haskell, is that "appellant's motion for a reference, the order of the Fourth District Court allowing it, and all the proceedings thereunder, were grossly irregular and a nullity."

This is simply a question of practice, and yet it is one of great importance.

A receiver is an indifferent person as between the parties, and is an officer appointed by the Court, and is, therefore, not to be disturbed by any person, without the special leave of the Court. He is appointed on behalf of all the parties who may establish rights in the cause, and the money in his hands is in *custodia legis* *for whosoever can make out a title to it. (Edwards on Receivers, 2, 3.)

In this case the complaint was for a dissolution of a partnership, the appointment of a receiver, and the distribution of the partnership assets among the creditors. The appointment of a receiver was only a means to attain the end contemplated by the plaintiff in the suit; and the employment of counsel by the receiver was also a means to attain the same end. But these means were equally within the relief prayed for by the plaintiff, for the reason that the relief could not possibly be obtained without the use of such means. And if the complaint intended to reach a certain end, it equally intended the use of all the means necessary to obtain it.

As the employment of counsel was contemplated by the suit,

and as it is conceded that the receiver had the right to stipulate with the counsel, that he must rely upon the allowance the Court might make out of the particular fund, and not upon the personal responsibility of the receiver, it became a question as to what was the proper course for the counsel to take under the circumstances. And the Court below seems to have taken a very just and satisfactory view of the practice proper in such cases.

It is the duty of the receiver to file his accounts when required by the Court, and if he fail in this, the Court, upon application of a party in interest, or upon its own motion, will compel him to do so. When his account is filed, all claims against the fund for disbursements, or engagements made by the receiver, would properly come before the Court for consideration. When the receiver has paid no money, but has made an arrangement with a party to receive such compensation as the Court may allow, he should report the facts, leaving a blank for the sum that may be allowed. If any of the parties employed by the receiver, should not be satisfied with the account, in whole or in part, they could then make their obligations, and if any one or more of them should feel aggrieved by the final order of the Court, they should all appeal, and all the questions should come up before this Court in one case. However extensive the record, and numerous the parties and questions might be, the labor of this Court, and the expense to the parties, would not in this way be increased, but diminished. But if a separate reference and a separate appeal were allowed in regard to each separate claim upon the fund, then the proceedings would be greatly prolonged, to the injury of all parties. And when the appeals should be taken, it would only be necessary for the Court below to order the receiver to retain so much of the fund in his hands as might be necessary to pay the disputed items, if finally allowed, and order a distribution of the remainder.

We will now proceed to examine the claim of the petitioner *upon its merits. And in the first place, we [317] must say that the index to the transcript is almost entirely worthless. The testimony fills some one hundred and fifty pages, and the only reference to it in the index is to the pages where it begins. And in the briefs of counsel no reference is made to the pages of the transcript, but only to the name of the witness, and the day on which his testimony was taken. In the points made by the respondent, it is true, a partial reference to the pages of the transcript is made. For these reasons, we have been compelled to waste much time in searching for matters that could have been readily found, either with a proper index, or a correct reference in the brief to the pages of the record. It appears that during the investigation had before the referee, Mr. Stanly was examined as a witness, at the instance of Mr. Park, one of the attorneys of Alvin Adams; and Mr. O. L. Shafter, also one of the attorneys of Alvin Adams, was examined

at the instance of the attorney for petitioner. The testimony of the receiver Naglee, was also taken.

In reference to the agreement between the receiver and Stanly, the latter states substantially, that he was retained as counsel for the receiver in all the business in which said Naglee was acting as receiver—that, as there was more than one man could attend to, it was agreed that Messrs. Shafter & Park were to be associated with Stanly, and the compensation for their services was to be allowed by the Court—that Shafter & Park were to receive their compensation through Stanly, and that Stanly was not to be responsible to Shafter & Park for any compensation, unless received by him; that the division between them of whatever compensation might be allowed, was left entirely to Stanly—that Stanly made an arrangement with Shafter & Park, to his satisfaction—and that the service was rendered by Shafter & Park according to their agreement with Stanly.

Mr. Shafter states, that “the arrangement as finally made between Shafter & Park, and Mr. Naglee, to which Mr. Stanly was a party, was this—Mr. Stanly was to be the attorney of record for the receiver, and Shafter & Park were to be associated with him, (Mr. Stanly,) in fact, but not on the record, and that we were to aid Mr. Stanly in the transaction of all professional business, as the receiver might require, and the service performed by the three, in aid of the fund, was to be the basis of charge, wholly irrespective, whether it was rendered by Shafter & Park, or Mr. Stanly, (that all the service was to be rendered through Mr. Stanly,) and charged for in his name; that is, the claim for the services of Shafter & Park, and Mr. Stanly, was to be presented in Mr. Stanly’s name, and the amount allowed by the Court was to be divided between Shafter & Park and Stanly, as they could agree upon.”

The receiver stated, that “the agreement between us [318] was, *that he (Stanly,) should receive five hundred dollars as a retainer, out of the first funds which should come into the hands of the receiver, and such other compensation should be allowed, after the services should be performed, as Judge Hager should conceive to be reasonable, and that I was not to be held responsible for any of the fees. There was an understanding between myself and Mr. Stanly, that there should be no official connection between myself and Messrs. Shafter & Park, in the matters pertaining to the business of Adams & Co., and that any assistance rendered by them to him, was a matter of understanding between themselves.”

The several statements of Mr. Stanly, Mr. Shafter., and the receiver, as to the arrangements between the parties, do not differ in substance, except as to the retainer-fee of five hundred dollars. The arrangement is clearly expressed in the language of Mr. Shafter: “Mr. Stanly was to be the attorney of record for the receiver, and Shafter & Park were to be associated with him in fact, but not on the record.”

In the account of Mr. Stanly, filed with the referee, he states

that "the valuable services of associate counsel are included in this account."

As the services of Shafter & Park constituted in part, the basis upon which the claim of the petitioner was allowed by the referee, it has been objected by the defendants and others, that the arrangement made between the receiver and the petitioner was illegal, and that the referee should have disregarded it. If this position be well taken, it would certainly affect the claim of the petitioner very materially.

Mr. Edwards in his work on Receivers in Chancery, states the rule thus:

"When the receiver is thus fully appointed, he should retain his own solicitor and counsel, who ought not to be the same as are employed by any of the parties in the suit; because the solicitors of the several parties are bound, in duty to their clients, to watch the proceedings of the receiver, and to see that he faithfully discharges his trust; and the undertaking to act as the solicitor or counsel for the receiver, under such circumstances, would therefore frequently cast upon the person thus assuming to act inconsistent and conflicting duties, both of which duties could not be properly discharged by the same person." (Page 93.)

It is insisted by the counsel of the petitioner that "Shafter & Park were not in fact employed at all as his counsel." But this would seem not to be true. Mr. Shafter in his testimony states that Stanly was the attorney of record, and Shafter & Park were associated with him in fact, but not on the record. The learned counsel insists, in another part of his brief, that "the *relation of Shafter & Park to Mr. Stanly, when exactly [319] considered, was not that of associate counsel."

But both Mr. Stanly and Mr. Shafter state differently, and it is apprehended that it would require a very exact discrimination to see the distinction. Certainly, Messrs. Shafter & Park acted as counsel. If they did not act as associate counsel with Mr. Stanly, in what capacity did they act? It is true, they are called, in one part of the brief, "subalterns" of Stanly; but this may be true, and yet, they may have been associate counsel. It is very usual, when several counsel are employed, to give one the leading control of the case, and the others must, of course, be subordinate. If Shafter & Park acted as the counsel of Adams, then they cannot have any claim upon the receiver, or upon the fund in his hands. On the contrary, if they acted as counsel for the receiver, they must have acted as associate counsel with Mr. Stanly, for they all three acted as counsel in the same matter, and for the same party, and claim pay out of the same fund. The only difference that can be perceived between the relation of Stanly and Shafter & Park, and that usually existing between associate counsel, consists in the fact that Stanly was the counsel of record, and Shafter & Park counsel in fact, and not of record. But it cannot be perceived how this circumstance can change the relation they sustained to each other, and

to the receiver, in the contemplation of a Court of Equity. On the contrary, this attempt to evade a salutary rule, in the manner stated, deserves the less indulgence. If Shafter & Park had put their names upon the record, as the associate counsel of Stanly, their claim for compensation would have deserved more consideration.

The learned counsel for the petitioner says, in another portion of his brief, that Shafter & Park "refused to subject themselves to the receiver's counsel, unless they could be compensated for it."

But what right had they, being the counsel of Alvin Adams, to subject themselves to the receiver's counsel, whether with or without compensation? Adams and the receiver clearly occupied very different positions with respect to the fund, and the claims upon it. When, therefore, Shafter & Park subjected themselves to the receiver's counsel, they placed themselves in a false position. It was the duty of Naglee to do entire justice to all parties. He had no interest in defeating just claims, or in allowing those that were unjust. His position was that of perfect impartiality. But it was not so with Adams. It was his pecuniary interest to defeat all the claims. Besides that, it was his interest to make the receiver liable, if he could. Suppose that Adams should wish to call in question the acts of the receiver, in those very cases where Shafter & Park advised [320] and acted as his counsel. It would certainly place the counsel in a most embarrassing position.

The salutary character of the rule which will not permit a receiver to employ as his counsel those engaged for any other party to the proceedings, and the necessity for sustaining and enforcing it, are forcibly illustrated, and confirmed by the facts and circumstances of this case. The counsel seem to have been fully aware of the rule, otherwise we cannot account for the circumstance that Shafter and Park were not associate counsel on the record, but were such in point of fact.

In the proceedings before the referee, Mr. Stanly was introduced and examined as a witness by Mr. Park, who acted ostensibly as the attorney of Adams. The fact that the petitioner was introduced by the counsel of Adams, is one of the grounds stated in the brief of counsel to sustain the decision of the referee in permitting Mr. Stanly's testimony to be heard against the objections made by the counsel of other parties. The only object for which the testimony of Mr. Stanly was introduced, must have been to sustain his claim. Alvin Adams had no interest in sustaining the claim, but Mr. Park had; for his compensation, under the existing arrangement, depended solely upon the success of the petitioner. If Mr. Stanly failed, in whole or in part, Mr. Park was directly affected. Mr. Park, then, in his ostensible capacity as counsel of Adams, introduces the petitioner upon the ground that he was an adverse party in interest to his client, Adams; while the real object of the testimony was to sustain the claim; and therefore, to obtain a direct advantage to

the attorney himself. And it is most justly remarked by the Judge of the District Court, that "Stanly and Park, instead of being in the position of adversaries, were coadjutors, and by the admissions of the one called out by the other, both were interested in sustaining the claim, and neither could testify in favor of the other as against the fund, or the parties claiming an interest therein."

After the introduction and examination of Mr. Stanly by Mr. Park, Mr. Shafter was introduced as a witness by the counsel of petitioner. Mr. Shafter stated that he had assigned his interest in the claim to Mr. Hayes, the attorney of Mr. Stanly. A motion was made before the referee to strike out the testimony of Mr. Shafter, which was overruled.

It is objected to the testimony of Mr. Shafter, that he was incompetent as a witness, for the reason that he was the assignor of an unliquidated demand, and therefore, incompetent under section four of the Practice Act. This objection is answered by saying that the rule applies only in actions brought by the assignee.

It is true that the language of that section, taken literally, applies only to suits strictly brought by the assignee. But we *must take the different provisions of the act together; and from a comparison of them all, seek the true meaning of the Legislature. By the four hundred and twenty-second section of the act "a person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness, in the same manner, and subject to the same rules of examination as if he were named as a party."

The substantial effect of this provision is, to place persons for whose immediate benefit the action is prosecuted or defended, though not parties to the record, upon the same footing as formal parties, so far as regards their position as witnesses. It is then clear, that if Mr. Shafter had not assigned his interest, he would not have been a competent witness for Mr. Stanly; and the intention of the fourth section, is to continue the incompetency of the witness after he has assigned his interest. The object of that section was to prevent the practice of assigning claims, with a view to making a witness of the assignor. This being the object of the statute, it does not matter whether the assignee is a formal party to the record, or whether the suit is prosecuted for his immediate benefit. The reason and principle of this rule will equally apply here. In this case the assignee was substantially a party, and that was sufficient. A substantial and a formal party stand upon the same footing as witnesses. So, a substantial and a formal assignee stand upon the same ground; neither can introduce the assignor as a witness. If this were permitted, the true intention of the statute could be indirectly defeated. A certain end was contemplated by the statute, and must be attained. The law cannot be defeated by simply varying the mode of attack. When the facts are known

to the Court, such attempts must fail. Here, Shafter & Park are first the counsel of Alvin Adams, the plaintiff in this suit; Mr. Stanley then becomes the counsel of record for the receiver, and Shafter & Park became his associate counsel in fact, and by an arrangement among themselves, they are to share in the compensation to be recovered through Stanly. Mr. Park, as counsel for Adams, introduces Mr. Stanly as a witness, and Mr. Shafter assigns his interest, and is introduced by his assignee, acting as attorney for Stanly. Surely, such a course cannot be sustained in a Court of Equity, however innocent the intention of the parties may in fact have been.

The testimony of both Stanly and Shafter was inadmissible.

In *Edwards on Receivers*, it is said that it "will not be well for a receiver, even though he may be a professional man, to act as counsel in the business of his trust, as he will not be entitled to any extra counsel-fees for his work."

The learned author refers to the case of the *Bank of Niagara*, (6 Paige, 213,) which sustains the position stated. In that case the Chancellor held, that "no allowance for extra counsel-fees *to himself, can therefore be made to a receiver, or other trustee, upon the settlement of his accounts."

The principle settled in these authorities is entirely applicable to the facts of this case. Shafter & Park being the counsel of Adams, had no right to subject themselves to the counsel of the receiver; and any services they may have performed, must be held to have been performed for their own client, and they must look to him alone for compensation. It would be as safe to permit a receiver to act as his own counsel, and to allow him compensation therefor, as to permit the attorney of the plaintiff to act for the receiver, and then claim pay out of the fund in his hands. The practice, if tolerated, would lead inevitably to the most melancholy abuses. Attorneys are officers of the Court, and it is its highest duty to see that its own officers conduct themselves properly; and that this end may be obtained, the Court should inflexibly discountenance every practice that may tend to bring reproach upon the administration of justice.

The petitioner is only entitled to compensation for the services he individually performed, and no more. And as to what those services were worth, we must leave the Court below to determine. That court is acquainted with all the facts and circumstances; and it would require, in our opinion, a clear abuse of that discretion, to justify any interference on the part of this Court.

Judgment affirmed.

MACOMBER v. CHAMBERLAIN.

APPEAL—STATEMENT, WHEN TO BE FILED.—Where a statement, to be used on appeal, is not filed within twenty days after judgment, it cannot be regarded, and the case will be determined on the judgment-roll alone.

APPEAL from the County Court of Tuolumne County.

John Oxley, for Appellant.

E. F. Hunter and *H. P. Barber*, for Respondent.

TERRY, C. J., delivered the opinion of the Court—**BURNETT, J.**, concurring.

This cause was tried before a jury, and a judgment rendered in favor of plaintiff on the 22d day of October, 1856. An appeal was taken, and a statement upon appeal filed by defendant on the 13th day of November, 1856.

The statute requires that statements on appeal shall be filed within twenty days after the entry of judgment, and provides that "if a party omit to make a statement within the time limited, he shall be deemed to have waived his right [323] thereto." (See Pr. Act, Secs. 338, 339.)

The statement in this case was not filed in time, and is not properly a part of the record. In the absence of a proper statement, or bill of exceptions, the case must be decided on the judgment-roll, which being regular on its face, the judgment is affirmed.

LEIGH CO. v. INDEPENDENT DITCH CO.

PLEADING, COMPLAINT FOR DIVERSION OF WATER.—A complaint alleging that plaintiffs are the owners, and in possession of certain mining-claims on a certain stream, and are entitled to the natural flow of the waters of the stream, which had been diverted to their injury by defendants, sets forth a sufficient cause of action.

IDEM.—It is not necessary that the complaint should further allege an appropriation of the water, or an ownership thereof.

APPEAL from the District Court of the Eleventh Judicial District, County of Placer.

The complaint alleges that the plaintiffs were the owners, and in the possession of certain mining-claims, situated in Volcano Cañon, over which the waters of said cañon naturally flowed, and that they were entitled to have the waters of said cañon flow as they naturally did, but that defendants diverted them to the injury of plaintiffs. The defendants demurred to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action, in this, that the complaint did not state that plaintiffs were the owners of, or had appropriated the water, or had been in possession of the same. The demurrer was overruled, and defendants appealed.

No brief on file for Appellants.

Tuttle and Hillyer, for Respondents.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

The demurrer was properly overruled. The allegation that the plaintiffs were the owners, and in the possession of the mining-claims, was sufficient, without setting out any of the particulars of their title. And the ownership and possession of the claims, drew to them the right to the use of the water flowing in the natural channel of the stream. The diversion of the water was, therefore, an injury to the plaintiffs, for which they could sue. The principle involved in this case was expressly decided by this Court, in the case of *Crandall v. [324] *Woods*, ante 136. In that case it was said: One who locates upon public lands with the view of appropriating them to his own use, becomes the absolute owner thereof, as against every one but the government, and is entitled to all the privileges and incidents which appertain to the soil, subject to the single exception of rights antecedently acquired."

Judgment affirmed.

ROGERS v. CODY ET AL.

PROMISSORY NOTE, PAYMENT ON CONDITIONS.—Where the payment of a promissory note is by agreement of parties made conditional upon the payment, by the payee, of a certain debt by the payor, such payment is a condition precedent to plaintiff's right to recover on the note, and must be averred in the complaint to have been made.

APPEAL from the District Court of the Fourteenth Judicial District, County of Nevada.

This is an action to recover a sum due on two promissory notes; the plaintiff sets out the notes, and also sets out an agreement entered into with defendants, in which it is stated that the notes were given in payment of a certain saloon; that there were debts against the promises sold, to the amount of fifteen hundred dollars, which plaintiff agreed to pay and discharge, and it was stipulated that the notes were to be deposited with a third party, as security, for the performance of plaintiff's agreement, and upon such performance he should be entitled to their possession.

The complaint does not allege payment by plaintiff, of the fifteen hundred dollars. Defendants demurred to the complaint. The demurrer was overruled, and no answer being filed, judgment was entered against defendants, from which they appealed.

McFarland & Niles, for Appellants.

Henry Meredith, for Respondent.

TERRY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

The payment of the indebtedness of the saloon was a condition precedent to plaintiff's right to recover on the notes, and as the complaint does not aver payment, the demurrer should have been sustained.

Judgment reversed, and cause remanded.

*HOWE v. SCANNELL.

[325]

WITNESS—VENDOR CANNOT IMPEACH HIS OWN SALE.—As a general rule, the vendor of goods is not a competent witness to impeach the sale made by himself.

¹ *IDEM*.—EXCEPTION TO RULE.—But where evidence is introduced showing a collusion between vendor and purchaser to defraud the creditors of the former, the declarations of the vendor are admissible, and, *a fortiori*, his sworn statement.

APPEAL from the Superior Court of the City of San Francisco.

Defendant, who was sheriff of San Francisco, under an execution, against one Sharp, seized on certain goods which were claimed by plaintiff under a purchase from Sharp.

This action was instituted for the recovery of the value of the goods, and the question submitted to the jury was as to the *bona fides* of the sale from Sharp to plaintiff.

Upon this issue, the jury found for the defendant, and plaintiff appeals.

On the trial, the defendant offered as a witness, to prove the fraudulent intent of the sale, Sharp, the vendor of the plaintiff, and the admission of this testimony is the only error assigned.

Evidence had been previously introduced by defendant, showing a collusion between Sharp and plaintiff. A motion for a new trial was made by plaintiff, and overruled by the Court below.

McDougall, Aldrich & Sharpe, for Appellant.

1. Sharp had a direct interest in the event of the action, and was, therefore, incompetent as a witness.

He was interested in subjecting the property to the payment of the attaching-creditor, and thereby discharging it.

Hence, he was interested in giving such testimony as would tend to render the bill of sale invalid. (19 Wend. 293; 16 Pick. 325; 4 Verm. 493.)

2. The testimony of Sharp having been illegal, the Court below should have granted a new trial.

A decision like this, however it may be viewed in a particular case, is dangerous in its tendencies, and must, if it has general application, work great injustice.

3. By the exclusion of this kind of testimony, the sound policy of the rule of law invoked is illustrated and vindicated.

No purchaser could feel entirely safe if left thus at the mercy of his vendor. Prompted by selfishness and interest, he may at any time point out property that he has sold in good faith, as prey to his creditors, and when seized by them defeat the claim of the purchaser to it; and this, after he had availed himself of a portion, if not all of the anticipated benefits of the sale.

4. Sharp's interest in the event of the action, was not balanced.

[326] *If the attachment on the property was sustained, it could not be considered as having been taken from appellant by a superior title to that of Sharp.

He would not have been liable to appellant on his warranty of title.

If Sharp's testimony was true, no action of any description could arise between appellant and Sharp.

If true, the transaction was one with which the law would not intermeddle. "*Ex turpi contractu, non oritur actio.*"

Howard & Gould, for Respondent.

The sole question presented is, as to the admissibility of the testimony of Sharp. The judge admitted his evidence, upon the ground that he combined with plaintiff to cheat creditors.

It is the duty of the Judge to pass upon the facts, which determine the admissibility of testimony. (*Bartlett v. Smith*, 11 Meeson & Welsby, 483.)

The facts having established a confederacy between the grantor and the grantee, the statements of the grantor are evidence.

"In an action against two, for combining to effect a fraud, if there is any evidence of a combination, the admissions of one of them, made in the absence of the other, are proper to be left to the jury." (*Oldham v. Bently*, 6 B. Mon. 428; *Stoball v. Farmers' & M. Bk.* 8 S. & M. 305.)

The declaration of the grantor, showing a fraudulent design in making the grant, are not admissible, unless fraud be first shown in the grantee, or a trust. (*Richart v. Caslator*, 5 Binney, 109.)

Even in criminal cases, the declarations of a conspirator are admissible against an accused, and of course, and *a fortiori*, in a civil case, they should be received.

"A foundation must be first laid, by proof sufficient, in the opinion of the Judge, to establish, *prima facie*, the fact of a conspiracy between the parties, or proper to be laid before the jury, as tending to establish such fact.

"The connections of the individuals in the unlawful enterprise being first shown, every act and declaration of each member of the confederacy, in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act and declaration of them all, and is, therefore, original evidence against each of them." (1 Greenleaf, Sec. 111, p. 187.)

"Declarations of the defendant in execution, showing a fraudulent intent on his part, are not admissible evidence against the claimant, unless he, or some one through whom he claims, was connected with the fraud." (*Newcombe v. Leabill*, 22 Ala. 631; *Glory v. The State*, 8 Guy, [13 Ark.] 236.)

"If three combine and conspire to defraud another, as a common object, the declarations and actions of one are evidence against all." (*Aldrich v. Warren*, 4 Ship. 465; [327] *Crary v. Sprague*, 12 Wend. 44; *Borland v. Mayo*, 8 Ala. N. S. 112, 113.)

We proved the absence of any change of possession; we proved the declaration of Howe, that he did not buy *bona fide*. We therefore stamped upon him the character of a conspirator.

And, having done this, we offered in evidence the statements of Sharp, and, be it remembered, not by hearsay, but by himself, on oath, and enabling the other conspirators to cross-examine him.

TERRY, C. J., after stating the facts, delivered the opinion of the Court—BURNETT, J., concurring.

As a general rule, the vendor of goods is not a competent witness, to impeach the validity of a sale made by himself.

But when evidence is introduced, showing a collusion between vendor and purchaser, to defraud the creditors of the former, the declarations of the vendor are admissible, and *a fortiori*, his sworn statement. (*Borland v. Mayo*, 8 Ala. N. S. 112, 113.)

We think the testimony was competent, under the state of facts proven, though we are not able to see the necessity for its introduction, as the fraudulent character of the sale had been clearly established, both by the circumstances attending the sale, and the absence of an actual and continued change of possession, as well as by the admission of the plaintiff, that the transfer had been made to avoid the payment of debts due by his vendor.

Judgment affirmed.

THE BEAR RIVER AND AUBURN WATER AND MINING CO. v. THE NEW YORK MINING CO.

¹ WATER RIGHTS—FIRST APPROPRIATOR.—The first appropriator of water for mining purposes, is entitled to have the water flow, without material interruption, in its natural channel.

² IDEM.—He is entitled to the water so undiminished in quantity, as to leave sufficient to fill his canal or ditch, as it existed at the time of subsequent appropriations of the stream above him.

IDEM.—DETERIORATION OF WATER.—But as to the deterioration in the quality of the water, by reason of being used for mining purposes, before it

1. Approved, *Hill v. King*, post 339; *Mokelumne Hill Co. v. Woodbury*, 10 Cal. 187. Principles, restricted, *Pilot Rock Creek Canal Co. v. Chapman*, 11 Cal. 162. Commented on, *Phoenix Water Co. v. Fletcher*, 23 Cal. 488; *Aitchison v. Peterson*, 1 Mont. 568;

reaches the ditch of the prior locator, it must be deemed *damnum obsequi injuria*.

IDEM—Any other rule would involve an absolute prohibition of the use of all the water of a stream above any ditch supplied by it, in order to preserve the quality of a small portion taken therefrom.

APPEAL from the District Court of the Eleventh Judicial District, County of Placer.

The parties to this action, are incorporated companies for mining and other purposes. Each company is the owner of a dam and ditch, by means of which, the waters of Bear [328] River are *diverted from the natural channel of the stream, and sold and used for mining purposes, and by defendants for the additional purpose of propelling a saw-mill. The plaintiffs were the prior appropriators of the waters of the stream, at the point where their dam, at the head of their ditch, is located. The defendants' dam and ditch were constructed subsequently to those of plaintiffs. The ditch of plaintiffs is some forty-eight miles in length, and that of defendants about twenty miles. The waters of the stream, diverted by the dam and ditch of defendants, after being used for mining and milling purposes, are returned again into Bear River, about seven miles above the head of plaintiff's ditch, except such portion as is consumed by absorption and evaporation. The jury found, specifically, that plaintiffs, by the act of defendants, had lost twenty inches of water per day, for ninety days, during the year 1855, and that the value was one dollar per inch per day. That defendants did detain the water, and cause the same to flow irregularly, and that plaintiffs were damaged by this cause seven hundred and fifty dollars; that defendants did adulterate the water, and plaintiffs sustained damage from this cause to the amount of three thousand dollars; that defendants did not materially waste and destroy the water, but used it in a reasonable manner, and with the least injury to the plaintiffs consequent upon its use, and it could not have been used in any other reasonable manner—and that defendants are entitled to the surplus water of Bear River, to the capacity of their ditch. Upon the facts as partly admitted by the parties, and partly found by the special verdict of the jury, the plaintiffs moved the Court for judgment. This motion was overruled by the Court, and judgment given for the defendants, from which judgment the plaintiffs appealed. The suit was commenced in November, 1855, and judgment rendered in September, 1856.

Crocker & Robinson, for Appellants.

The prior appropriators of the waters of a stream in the mineral districts of this State, acquire thereby the right to the use of the water. (*Irwin v. Phillips*, 5 Cal, 140; *Tartar v. Spring Creek Co.*, Id. 395; *Hill v. Newman*, January Term, 1856; *Conger v. Weaver*, October Term, 1856.)

Such prior appropriator acquires a positive right to hold and

enjoy the same as property; a vested right, which cannot be taken away. (*Conger v Weaver*, 6 Cal. 548.)

A subsequent locator upon a stream, whose waters have thus been taken by a prior appropriator, "has no right to complain, no right to interfere with the prior occupation of his neighbor, and must abide the disadvantage of his own selection." (*Irwin v. Phillips*, 5 Cal. 140.)

The party building a dam on a stream, appropriates all the waters above the dam. (*Kelly & Co. v. Natoma Co*, 6 Cal.)

*But the case of *Hill v. King*, recently decided, deter- [329] mines fully the very points involved in this case, and applies the principles already established, to the class of cases of which this is one.

We therefore contend that the plaintiffs, by their prior appropriation, acquired a positive vested right, to hold, enjoy, and use the waters of Bear River, without any material diminution in quantity, deterioration in quality, and unaffected in its regularity of flow, and this, whether by a person located on the stream below or above.

1. As to the right of action for diminution of quantity:

Every man has a right to have the advantage of a flow of water in his own land, without diminution in quantity or quality. (3 Rawle, 355; 2 Cow. 584; Angell W. C. Sec. 95, 96, and note; 2 Eden Injunctions, 232, and note 2; 3 Kent's Com. 537.)

Angell, after examining the authorities, sums up by declaring that an action will lie for an essential diminution of the water. (Angell. W. C. Sec. 129; 2 Eden on Inj. 232, 1 note.)

2. The right of action for deterioration in quality: Every person has a right to have the advantage of a flow of water in his own land, without alteration in quality. (3 Rawle. 256; Angell W. C. Secs. 95, 96, and note; 2 Eden Inj. 232, note 2; 3 Kent's Com. 537.)

Defendant threw a dead hog into a spring on his own land, and so corrupted the water which plaintiffs had used for over twenty years—held liable for damages. (7 Mon. 325.)

A proprietor above cannot use the water so as to corrupt or impair its quality to the injury of others, as in permitting sawdust to fall into it. (*Lewis v. Stein*, 16 Ala. 218, 219; or in erecting a tan-yard, 3 Rawle, 256; or, in working a mine, 11 Adolph & Ell. 571; Angell W. C. sec. 136.)

No proprietor has a right to use water to the prejudice of another. The true test of the principle and extent of the use of water is, whether it is to the injury of the other proprietors or not. (2 Eden. Inj. 232, 1 note; 6 Port. 472; 4 Mas. 400, 401.)

3. The right of action for irregularity of flow:

Where the party above detains the water an unreasonable time, and makes it flow irregularly, an action lies. (Angell W. C. Sec. 115; 9 Cow. 540; 3 Kent Com. 540; 17 Johns. 306.)

E. D. Baker and Jo. G. Baldwin, for Respondent.
We contend:

1. That in adjusting these water-rights, we may follow, indeed, the rules of the common law; but that we cannot follow literally the application, which, under different circumstances, has been made of those rules.

We take from the common law the spirit and reason which fashioned the rule; but we cannot apply the rule with exact and unbending vigor.

[330] *The reason why a riparian owner is entitled to the flow of the water undiminished, is, because the water is a part of the inheritance; it is a part of the land; and he is as much entitled to the use of the water as to the use of the land.

But the plaintiff, while he invokes, ignores this very principle; for he claims to take all the water above and below him; to sell it as merchandise and divert it from its accustomed channels, and from the lands of the proprietors below him, or, which is the same thing, those who represent that proprietor.

The truth is, the plaintiff does not, and cannot claim under this common law right of riparian owner at all. What he claims is, not that he is owner or *quasi* owner of the soil, and therefore, entitled to the flow of the water; but that he has made a ditch, by which he has taken to himself all the water he could catch. He claims an ownership of the water as a distinct property from the ownership of the land; the land becoming, at most, an adjunct of the water. Now, he invades the very principle he invokes for his protection, for he asserts dominion over our water, to which we have, at least, equal right. He claims it all by no better title than that he was the first to appropriate it, and this against the rights of the *supra proprietor*, and those who go in under him. He not only claims the water in his ditch, but the water in the stream which supplies his ditch. He claims a monopoly of all the water which he has sought to appropriate; and he must do this upon a principle so broad as to make a riparian right for as many miles as he chooses, and for all time, to the entire destruction of every other right, and to the impoverishment and ruin of all the country above him.

2. If we concede that the riparian right prevails, as at common law, still the plaintiff is not entitled to recover, under the modification of the common law, which the necessities of the case require. The rule of the common law, as to water, was not a rule of monopoly in its use, in favor of any proprietor, but a rule of equality as to all. No one was so to use as to materially diminish or deteriorate, but all were to use for their reasonable and necessary purposes. All might use a small stream for domestic purposes; but *sic utere tuo*, etc., applied. Now, the reasonableness of the use might be dependent on the circumstances. If a man had plenty of springs on his land he could not, probably, if he kept a large washing establishment, use the water of a running stream so as to diminish the quantity necessary for the neighbors below. But if the water was of such quality as not to be fit for any but one purpose, which was irrigation, I

take it that the use for this purpose being a common and necessary use to all, might be had, with reasonable limitations, by all; no man having a monopoly, and no man being shut out from his share. The rule in that case would be to allow the man above to lead off the water for irrigation and to *return it again, diminished only by the necessary use; [331] or to use such of it as might be necessary, at such times, to allow a similar use by others. To hold otherwise would be to deny any use of the water at all in the given category.

Apply this: Here the water is only valuable for mining purposes; it is a part of the land above, and as necessary to the land above as to that below. There is the same paramount proprietor above and below. He has never relinquished his title; the tenants on the land are only tenants at sufferance; each claiming by the same tenure and to hold the property by leave or license. The water is useful to two districts of country. The ditch being a tangible thing in possession, and connected with the freehold, of course the ditch and the contents of it would be protected from any sort of invasion. But how would it be with the water above the head of the ditch? Would not the proprietor—the government—have a right to use that water if he chose, for forts, gardens, shops, anything?

Or, if the government chose to work its mines could it not use its own water on its own land? And if so, does not the man who enters under the government, by its leave, have the same right, as against another appropriating only through the same license? What is the difference? The government, though it has given this tacit license to go on the public lands, yet has given no license to destroy any part of the inheritance: it has given no license to take from the land the water belonging to it; and could unquestionably enjoin or recover for the trespass.

The consequences of an opposite doctrine are most ruinous. It holds the right of an unlimited appropriation of water of a whole river, watering a large district of country; and the consequences of the doctrine would be, that large portions of the State would be denied the use of an element indispensable to the prosperity of the country. It would not promote the general benefit of the country; for the diversion of water to, and its exclusive appropriation at, a particular point, would of necessity, by limiting the area of the use, restrict the benefits to a smaller number of men, and a smaller district of country. It deprives a whole region of country of water, naturally tributary to that country, in favor of a particular locality, without any showing or presumption that this locality is either of greater importance, or would be better productive of the general interest, than the allowing the use of the water in its natural and accustomed channels, or to the country of which it is naturally tributary.

It contravenes all principle; for neither by common law, nor upon reason, can it be contended that one tenant on a common

estate can claim all the water, as against his co-tenant or the landlord.

It is grossly inconsistent, for it asks the Court a right of [332] *exclusive appropriation, and to be protected against interruption of the flow of water, when it takes up and seizes it and all, and interrupts the use above and below it.

The true principle is, as we contend, that it is a thing of compromise, and that the truth lies in the middle, between both extremes; a use above as well as below the ditch—and a use (as put to the jury) graduated by the circumstances of the case—allowing *all* the use, and none to be excluded; and if that use is necessary of *some* injury to the other, that minor injury is to be tolerated for the sake of justice, so that one man's right shall not be taken away in favor of another man's convenience.

BURNETT, J., after stating the facts, delivered the opinion of the Court—TERRY, J., concurring.

It may be said, with truth, that the judiciary of this State has had thrown upon it responsibilities not incurred by the Courts of any other State in the Union. In addition to those perplexing cases that must arise, in the nature of things, and especially in putting into practical operation, a new constitution and a new code of statutes, we have had a large class of cases, unknown in the jurisprudence of our sister States. The mining interest of the State has grown up under the force of new and extraordinary circumstances, and in the absence of any specific and certain legislation to guide us. Left without any direct precedent, as well as without specific legislation, we have been compelled to apply to this anomalous state of things the analogies of the common law, and the more expanded principles of equitable justice. There being no known system existing at the beginning, parties were left without any certain guide, and for that reason, have placed themselves in such conflicting positions that it is impossible to render any decision that will not produce great injury, not only to the parties immediately connected with the suit, but to large bodies of men, who, though no formal parties to the record, must be deeply affected by the decision. No class of cases can arise more difficult of a just solution, or more distressing in practical result. And the present is one of the most difficult of that most perplexing class of cases.

The business of gold-mining was not only new to our people; and the cases arising from it, new to our Courts, and without judicial or legislative precedent, either in our own country or in from which we have borrowed our jurisprudence; but there that are intrinsic difficulties in the subject itself, that it is almost impossible to settle satisfactorily, even by the application to them of the abstract principles of justice. Yet we are compelled to decide these cases, because they must be settled in some [333] way, *whether we can say after it is done, that we have given a just decision, or not.

The use of water for domestic purposes, and for the watering

of stock, are preferred uses, because essential to sustain life. Other uses must be subordinate to these. In such cases, the element is entirely consumed. Next to these may properly be placed the use of water for irrigation in dry and arid countries. In such cases, the element is almost entirely consumed. Under a proper system of irrigation, only so much water is taken from the stream as may be needed, and the whole is absorbed or evaporated. Entire absorption is the contemplated result of irrigation. When properly used, as a motive power for propelling machinery, the element is not injured, because the slight evaporation occasioned by the use is unavoidable, and is not esteemed by the law a substantial injury. Any number of riparian proprietors, can use the water as a motive power, in succession, without substantial injury to any other, for the element is just as good for the purposes of the last, as for those of the first proprietor.

Considering the different uses to which water is applied, in countries governed by the common law, it is not so difficult to understand the principles that regulate the relative rights of the different riparian proprietors. As to the preferred uses, each proprietor had the right to consume what was necessary, and after doing this, he was bound to let the remaining portion flow, without material interruption or deterioration, in the natural channel of the stream, to others below him. If the volume of water was not sufficient for all, then those highest up the stream were supplied in preference to those below. So far as the preferred uses were concerned, no one was allowed to deteriorate the quality of the water. And for the purposes of a motive power, there was no use of the element that could impair its quality.

But in our mineral region we have a novel use of water, that cannot be classed with the preferred uses; but still a use that deteriorates the quality of the element itself, when wanted a second time for the same purposes. In cases heretofore known, either the element was entirely consumed, or else its use did not impair its quality, when wanted again for the same purpose. And this fact constitutes the great difficulty in this, and other like cases. If the use of water for mining purposes did not deteriorate the quality of the element itself, then the only injury that could be complained of, would be the diminution in the quantity, and the interruption in the flow. It is this novel use of water, and its effects upon the fluid itself, that constitute the main difficulty in this case.

In repeated decisions of this Court, it has been uniformly held, that the miners were in the possession of the mineral lands under a license from both the State and Federal Governments. This being conceded, the superior proprietor must have had some leading object in view, when granting this license; and that object must have been the working of these mineral lands to the best advantage. The intention was to distribute the bounty of the government among the

greatest number of persons, so as most rapidly to develop the hidden resources of this region; while at the same time, the prior substantial rights of individuals should be preserved. In the working of these mines, water is an essential element; therefore that system which will make the most of its use, without violating the rights of individuals, will be most in harmony with the end contemplated by the superior proprietor.

Keeping this position in view, we will proceed to examine the questions arising in this case. It has been held by this Court, that the owners of a water-ditch were entitled to the exclusive use of the waters of the stream, as against all subsequent locators on the stream below the ditch. In the late case of *Hill v. King and others*, it was held, that the ditch proprietor was equally entitled to the exclusive use of the water, pure and undiminished, as well against the subsequent locator above, as below, the ditch; and that the two cases were not distinguishable in any essential particular. In that case, a petition for a rehearing was filed, and has not yet been disposed of. The question is still, therefore, an open one.

It would certainly seem, at first view, that there could be no distinction in the two cases. But is this true? When a party constructs a ditch, and diverts the waters of a stream before the rights of others have attached below, he only takes it from one unoccupied mining locality to another. In such case, there can, as a general rule, be no substantial injury done to the mining interest of the State, or to the rights of individuals. The water is taken to a locality where it is used; and after being so used, it finds its way to other mining localities, where it is again used. The effect of the diversion is not to diminish the number of times the water may be used. In the majority of cases, it is used as often, and upon the whole, as profitably, as if it had never been diverted, but had continued to flow down its natural channels. The general usefulness of the element is not impaired by the diversion. It may be very safely assumed, that as much good, if not more, is accomplished by the diversion, as could have been attained, had such diversion never occurred. In fact, we must, in reason, presume that the water is taken to richer mining localities, where it is more needed, and, therefore, the diversion of the stream promotes this leading interest of the State. It was upon the principle, that the leading interest of the superior proprietor was attained by these diversions, that the decisions of this Court sustaining them, were predicted.

[335]. *But for the sake of the argument, we will take the position to be true, that the owner of a ditch at any point upon a stream in the mineral region, has the exclusive right, as against all subsequent locators above his ditch, to the use of the water, undiminished in quantity, unadulterated in quality, and uninterrupted in flow. We will, then, endeavor to see how such a theory will operate in practice. And before we do this, we must concede, that as a general rule,

the effect of a particular construction of a statute, or the application of a certain principle, cannot be used against it, except in cases of reasonable doubt. If the meaning of the statute be clear, or the application of the principle well settled, Courts are not disposed to consider the consequences. The legislative power is responsible for them in such cases, and relief must be sought there. But in these mining cases, we are virtually projecting a new system, and if ever the practical effects of a theory could be justly considered in any case, it is apprehended it could be legitimately done in this.

It is stated by a very intelligent witness in this case, that "as rapid a stream as Bear River would carry sediment a long way;" and it may be correctly said, that about the same rapidity of current is found in all the mountain streams.

If, then, we lay down the doctrine as true, that the ditch-owner is entitled to the water in as pure a state as it was at the time he constructed his ditch, the result must be that those locating above him can never use the water at all, even in cases where the upper end of the ditch taps the stream near the point where it leaves the mineral region. For as the streams are rapid, the sediment must, in greater or less quantities, come down to his ditch. The inevitable practical result must be, that the water cannot be used so often, and the general usefulness of this element for mining purposes must be greatly impaired, and the leading intention of the superior proprietor be thus far defeated.

It would seem, therefore, that there is a greater difference between the two cases than would at first appear. But this difference is greater still, when we come to consider other cases that must arise. Suppose the ditch only takes from the stream a portion of the volume, say, for example, one tenth, the remaining portions are left to flow down the natural channel, and may or may not be used as they may or may not be needed below. But in such a case, what are those who afterwards locate above, on the same stream, to do? If they use any portion of the water, it becomes charged with sediment that must mingle the whole volume of the stream, and the water, thus deteriorated, must flow to the ditch. And if the principle is sustained that the water must flow pure to the ditch, then the nine tenths cannot be used above the ditch for mining purposes; and because the ditch-owner has taken away a por-tion only of the [336] stream, must the use of the other nine tenths be lost to all?

After the most careful and anxious consideration of this most difficult subject, the following conclusions occur to me as the nearest practicable approach to a fair and equitable adjustment of this matter:

1. The ditch-owner is entitled to have the water flow, without material interruption, in its natural channel. This right would seem to be compatible in general with the fair use of the water above.

2. He is entitled to the water, so undiminished in quantity, as to leave sufficient to fill his ditch as it existed at the time the locations were made above. This right is essential to the protection of the ditch-owner. If we lay down the rule that the subsequent locators above may so use the water as to diminish the quantity, it would be difficult to set any practical limits to such diminution, and the ditch-property might be rendered entirely worthless. As the water cannot be absorbed or evaporated but once, the ditch-owner should be entitled to its exclusive use in such a case.

3. And as to the deterioration in quality, the injury should be considered as an injury without consequent damage.

For these reasons, I think the judgment of the Court below should be reversed, and the cause remanded for further proceedings.

HILL v. KING ET AL.

¹ **WATER RIGHTS—FIRST APPROPRIATOR.**—The right of the first appropriator of water is equally protected from damage occasioned by subsequent locators above him, as well as below.

APPEAL from the District Court of the Eleventh Judicial District, County of Placer.

The plaintiffs in this case were the owners of two water-ditches, leading the waters of Indian Cañon to various mining localities, that were constructed in 1852. In 1855, the defendants took possession of certain mining-claims on Indian Cañon, at a point about one mile above plaintiff's dam, and commenced working them, by the sluicing process, and in so doing, washed down large quantities of mud, gravel, and sediment, into the bed of the cañon, which sediment, etc., was carried into plaintiff's ditches by the water used by the defendants in sluicing, and that thereby the ditches of plaintiff were filled up, and also plaintiff's reservoirs, and the water rendered so thick and muddy that it was almost valueless for mining purposes. There was [337] *testimony on the part of the defense, going to show that defendants had worked their claim in a reasonable manner, and had used water coming from another cañon. On the trial, plaintiff asked the Court to instruct the jury, as follows, which being refused, an exception was duly taken:

"That if plaintiff had constructed his ditches, and appropriated the waters of Indian Cañon, and was using said water, for sale for mining purposes, and defendants subsequently located mining claims near the bank of said cañon, and above the head of plaintiff's ditches, and in working said claims, they, the defendants, occasioned a material and essential injury to the waters of said cañon, so that their value was materially and essentially impaired for the mining uses to which they were being

1. Cited *Phoenix Wat. Co. v. Fletcher*, 23 Cal. 488.

put by plaintiff, such acts are sufficient to entitle the plaintiff to his action. And although defendants may have worked their claims in the most practicable and reasonable manner, and may have done no more damage than it was necessary to do, in order to work their claims, yet the plaintiff was entitled to recover from them to the extent of the damage done by them."

Judgment for defendants. Plaintiff moved for a new trial, which being denied, he appealed.

This case was decided at the July Term of this Court, but was reversed on a petition for a rehearing.

Hale & Hillyer, for Appellant.

Charles A. Tuttle, for Respondents.

At the July Term, MURRAY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

The only question involved in this case is, whether the proprietors of a water-ditch can maintain an action against the subsequent locators of mining-claims for a deterioration or diminution of water so appropriated.

It has been repeatedly held by this Court, that as against those locating below the head of a ditch or point where the water is diverted from the stream, the owners of such ditch, if their appropriation of the water was prior to the location of mining or other claims had a superior right, and might protect it by the ordinary remedies known to the law. The only difference between this case and those heretofore decided, consists in the fact, that the defendants' claims are above and not below the head of the plaintiff's ditch.

It is difficult to discover why the principle which governs one case should not be equally applicable to the other, or why, if the law gives to the first appropriator a right to the use of the water, pure and undiminished, as against the subsequent appropriator *below, he should be allowed by a mere change [338] of position to evade the consequences of the rule, and to place himself in a position which would destroy the rights of the first appropriator.

The right to appropriate the waters of the streams of this State, for mining and other purposes, has been too long settled to admit of any doubt or discussion at this time. Some of the older English authorities held that a right to water might be acquired by a riparian proprietor, by appropriation, and this Court might, with propriety, have maintained the rights of water companies, on the ground that they were riparian owners; but it has based this right on the ground that the legislation of the State has given to every one, not only the privilege to work the "gold placers," but also to divert the streams for this and other purposes. The legislation of the State has been held to amount to a "a general license to all," (whether properly, is not for me to say, the point having been decided by a majority of the Court against

my own opinion—see *Conger v. Weaver*, 6 Cal. 54,) and when these ditches have been constructed, they are regarded as a franchise or easement, belonging to the proprietors, and are entitled to protection as any other property.

The only test as between parties, where the lands belong to the United States or this State, is priority of location, and whether a party locates above or below the claim of another, his right depends or originates in appropriation alone; he must take, subject to the higher right of those who were first in point of time to appropriate. If the parties both claimed as riparian proprietors, then each alike would be entitled to the reasonable use of the water for proper purposes. But in such case the *supra* riparian proprietor must so do the same as to do his neighbor the least possible injury, and the general rule is, that each riparian proprietor is entitled to the free use of the waters, pure and undiminished, except the deterioration or diminution be so slight or unimportant as not to materially diminish the quantity or quality.

Testing the case by this rule, it might be asserted with confidence, that the facts of this case warranted a recovery. But when it is taken into consideration that the parties do not claim as owners of the soil, that none of the rules applicable to riparian proprietors apply, and that they both ground their respective rights upon their location; then, the rule which has been so often laid down by this Court, must apply, and he who has first diverted the waters of a stream, and appropriated them to his own use or purposes, must be held entitled to the exclusive enjoyment of the same, pure and undiminished. By this, we do not mean to say that those above him cannot use the water for any purpose; the use must be a reasonable one, and the injury or diminution small or inconsiderable. Any other rule [339] would *destroy this interest entirely as it would enable any person, by locating above the head of a ditch, to destroy the value and utility of the same, and no man could count with safety upon his enterprise, unless he commenced at the source of the stream. The opposite rule would apply as well to the diversion, as to the deterioration of the water, and after large sums had been expended in constructing a ditch, any one might render the same worthless by locating above, and asserting his right to divert the water. From these views it results, that the instructions of the Court below were erroneous.

Judgment reversed, and cause remanded.

On the application for a rehearing,

BURNETT, J.—This case was decided at the last term, and the opinion of the Court was delivered by the late Chief Justice, in which I concurred. Since that opinion was delivered a petition was made for a rehearing by the counsel of defendants, and the case of the *Bear River Company v. The New York Company*, ante 327, has been argued and submitted. Upon more full and mature consideration, I think the former opinion of the Court

should receive some qualification. My views may be found in my opinion in the case of the *Bear River Co. v. New York Min. Co.*, ante 227. The petition for a rehearing should be denied.

DEIDESHEIMER ET AL. v. BROWN.

SUMMONS, WHEN RETURNABLE.—A justice of the peace cannot make a summons returnable in eleven days after service.

1 APPEARANCE, WHAT ERRORS NOT WAIVED BY.—Where a defendant appears for the purpose of taking advantage of an irregular summons by a motion to dismiss, it does not amount to a waiver of his rights so as to cure the defect.

IDEM.—Nor does he waive his rights by answering after moving to dismiss, and motion overruled.

APPEAL from the County Court of Placer County.

Tuttle & Myers, for Appellants.

Welsh & Hillyer, for Respondent.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

Action before Justice's Court, to recover mining-claim; summons issued and served February 3, 1857, returnable February 14. Defendant moved to dismiss the case, because the summons was dated, issued, and served, more than ten days before its return. Motion overruled, and defendant answered. Judgment for defendant, and plaintiff appealed to the County Court. De-*fendant again moved to dismiss, and motion [340] overruled. Trial upon the merits, and judgment for plaintiffs, and defendant appeals to this Court.

The motion of the defendant to dismiss should have been sustained. If the justice could make the summons returnable in eleven days from its date, then he could make it returnable in eleven months. The defendant has an interest in a speedy trial, as well as the plaintiff. The appearance of the defendant, for the purpose of making the proper motion, did not waive his rights; had he answered without any objection, then he could not afterwards have complained. (Pr. Act, Sec. 541; *Whitwell v. Barbier*, 7 Cal. 54.)

But we would not be understood as expressing any opinion as to whether such a judgment could be collaterally impeached or not. That question does not arise in this case. Here the defendant promptly appealed from the judgment itself.

The judgment of the County Court is reversed, and that Court will dismiss the plaintiff's case.

1. Cited *Gray v. Hawes*, post 569; *Lyman v. Milton*, 44 Cal. 635; *Paul v. Armstrong*, 1 Nev. 98.

FRANKLIN v. REINER.

¹ **APPEAL, WHAT TRANSCRIPT MUST SHOW.**—Transcripts used on appeal to this Court must show that the undertaking has been filed in due time; and that a notice of the appeal has been duly served upon the other side.

APPEAL from the District Court of the First Judicial District.

Plaintiff, Franklin, laid this action for damages against the defendant, as sheriff, for an alleged illegal seizure of his stock of goods. The case was tried, and judgment entered for defendant. Plaintiff moved for a new trial, which being denied, he appealed. The record does not in any manner disclose the existence of an appeal-bond, or show that the notice of appeal was served upon defendant, or his attorneys

Robert F. Morrison, for Appellant.

———, for Respondent.

BURNETT, J., delivered the opinion of the Court—TERBY, C. J., concurring.

Motion to dismiss appeal.

In the case of *Bryan v. Berry*, (*ante* 180), we decided that it must be shown, by the certificate of the clerk, that the undertaking on appeal was filed in due time. In this case there was nothing to show that the undertaking had been given.

[341] *Another objection urged is, that there was no proof of service of the notice of appeal. The object of the notice would be entirely defeated without service. The appellant should show due service of the notice. It is an affirmative matter, to be proven by him. The respondent could not be expected to prove a negative, that he never had notice.

Motion to-dismiss sustained.

PEOPLE v. PAYNE.

¹ **TRESPASS—FORCE MAY BE USED TO RESIST.**—The owner of property in the possession of the same, has a right to use so much force as is necessary to prevent a forcible trespass.

² **IDEM.—FORCE REPELLED BY FORCE.**—Where a trespasser goes with the intent and with the means to commit a felony, if necessary to accomplish the end intended, the owner of the property may repel force by force.

³ **CRIMINAL PROCEDURE—INSTRUCTIONS TO BE IN WRITING.**—The instructions of the Court must be in writing. They should place the real points arising under the testimony fully before the jury.

⁴ **IDEM.—VERBAL MODIFICATION ERRONEOUS.**—A verbal modification of a written instruction asked, is erroneous.

1. Cited *Whipley v. Mills*, 9 Cal. 641; *Hastings v. Halleck*, 10 Cal. 81; *Randall v. Buffington*, 10 Cal. 491; *Conner v. Jones*, 28 Cal. 59; *People v. Alameda Turnpike Co.*, 30 Cal. 184.

2. Cited *People v. Houshell*, 10 Cal. 87; *People v. Acosta*, *Id.* 196.

3. Cited *People v. Wogner*, 14 Cal. 458; *People v. Chares*, 26 Cal. 79; *People v. Trim*, 37 Cal. 276; *People v. Sanford*, 43 Cal. 35; *People v. Bonds*, 1 Nev. 36. See *People v. Demant*, *post* 423.

APPEAL from the District Court of the Fifth Judicial District, County of Tuolumne.

Indictment and trial for murder, and conviction in the second degree. At the trial, the counsel of defendant asked the Court to give the jury the following instruction in writing:

"If the defendant was in imminent danger of great bodily injury from the deceased at the time of the killing, then they are to find him not guilty."

Which instruction the Court gave, with this verbal qualification:

"That the jury must take into consideration the intent of the defendant in going to the place of the alleged killing."

The defendant's counsel excepted to the giving of the instruction as modified, and assigns two grounds of objection:

1. That the instruction, as qualified, is too broad when considered with reference to the testimony.

2. That the qualification should have been given in writing:

The substantial facts of the case, concisely stated, were these:

There was a dispute existing between William S. Stone and defendant Payne, about a tract of land. The defendant had placed some posts upon the track with a view to the construction of a fence. On the Friday before the killing, which occurred on the Monday following, a suit had been tried, and the case appealed. Stone and the deceased, J. H. Vaughn, who was employed by Stone, were engaged in hauling away the posts to keep Payne from doing it, and had removed two loads of the posts to Stone's corral. Payne, with a hand in his employ by the name of Rowe, went to the place where the posts were deposited, and Payne proposed to Stone to let the posts [342] remain until the lawsuit was determined, and forbid him from moving them. Stone replied he would move them. Payne then told him he must abide the consequences, and Stone replied he did not care what he said. Payne was armed with a single-barreled shot gun, which he carried under his right arm, with the barrel resting on his left, and with the muzzle in the direction of Stone. Vaughn was armed with a pistol, which he carried in a belt around his body. Stone then changed his position, and said to Vaughn "give me that," and Vaughn stepped around and said, "never mind." Vaughn then said "Stone, put on the posts; Payne, put up that gun," and drew his pistol, when Payne fired and killed Vaughn.

Defendant appealed.

E. D. Baker, for Appellant.

We submit, that in a criminal case, where a written charge is presented, and it is modified, that the modification must be in writing. (C. L., 473, Secs. 400, 401.) That the object of the law was to place the charge of the Court fairly in the record, by requiring him to sign the charge and its modification, after it had been reduced to writing, that it might be so presented as to leave no doubt as to its terms. In not reducing the modifica-

tion of the charge to writing and signing it, the Court did not conduct the trial in the manner required in the statute.

We insist that the charge in this case was too broad. It does not alter the nature of the crime, that Payne went upon the ground with the intention of forcibly preventing the removal of the fence, if, when he got there, he did not begin the assault. It is in proof, that the party slain, ordered the fence removed, and at the same time leveled his pistol at Payne. Under such circumstances, the defendant fired in self-defense. It is no answer to say, that Payne premeditated violence; that cannot be presumed, especially when the deceased began the fight without any necessity in the way of self-defense, but merely to enable him to remove the property in dispute. The fact that defendant was then armed does not change his right of self-defense, if in point of fact he was not the assailing party.

W. T. Wallace, Attorney-General, for Respondent.
No brief on file.

BURNETT, J., after stating the facts, delivered the opinion of the Court—TERRY, C. J., concurring.

From all the testimony taken together, it would seem clear that Stone and Vaughn went with the pre-determination to remove the posts by force, if necessary. It is equally clear, that

Payne went upon the ground determined to prevent their [343] re-removal by force, if required. Whatever may have been the merits of the respective claims of each party to the land in dispute, the posts were the admitted personal property of Payne, and Stone had no right to remove them and appropriate them to his own use. The lawsuit was still pending and undetermined, and the proposition of Payne to let the posts remain until the determination of the lawsuit, was the most reasonable, and showed a desire then to avoid a difficulty. Whatever might have been the result of the suit about the land, the property in the posts would have remained in Payne, and he would have had the right to remove them at any time, by making good any damage occasioned by their deposit upon, and removal from the premises.

It would seem clear that the act of Payne could not amount to manslaughter, for the reason, that this offense "is the unlawful killing of a human being without malice, express or implied, and without any mixture of deliberation." (Com. Laws, 641.) There was certainly deliberation on the part of Payne, and the offense, if any, was murder.

Justifiable homicide is defined by our statute to be "the killing of a human being in necessary self-defense, or in defense of habitation, property, or person, against one who manifestly intends, or endeavors, by violence or surprise, to commit a felony," etc.

Under the circumstances of this case, the jury had to inquire whether Stone and Vaughn manifestly intended, or endeavored

by violence, to commit a felony—and if so, whether the act of Payne was in necessary defense of himself or property. Stone and Vaughn knew that the property belonged to Payne, and the evidence goes clearly to show that they went with the determination to remove it to the premises of Stone, peaceably if they could, and forcibly if they must. The removal was determined upon, and their subsequent conduct depended upon contingencies. If the owner of the property resisted, they were prepared to use force to accomplish the trespass. It was not the intention or endeavor of Stone and Vaughn to commit a felony, in respect of the property, for they did not intend to steal it. Nor was it their intention to commit robbery, for the felonious intent as to the property, was wanting. But the felony they intended to commit, was the killing of Payne, if necessary to accomplish the removal of the posts. Payne being the owner of the property, and in possession of the same, had a right to use such force as was necessary to prevent a forcible trespass; and if in doing so, he was compelled to kill Vaughn, he was justifiable. If Vaughn had not been armed, and had simply attempted the trespass without force of arms, and neither intended nor endeavored to commit a felony himself, then Payne would not have been justified in killing him. But when the trespasser goes with the intent, *and with the means [344] to commit a felony, if necessary, to accomplish the end intended, the owner of the property may repel force by force.

The instructions given did not place the real points arising under the testimony, fully before the jury.

The verbal modification was erroneous. It constituted a part of the instruction as given, and if the instruction itself must be in writing, each part composing it must also be in writing.

The Act of May 7, 1855, is positive, and the decision of this Court, in the case of *People v. Beeler*, 6 Cal. 246, is directly in point.

Judgment reversed, and the cause remanded for further proceedings.

MONTROSE v. CONNER ET AL.

¹ **MECHANICS' LIEN**—NOTICE INSUFFICIENT.—The following notice of mechanics' lien does not contain such a description of the premises as the statute contemplates: A dwelling-house, lately erected by me, for J. W. Conner, situated on Bryant street, between Second and third streets, in the city of San Francisco, on lot No. _____.

IDEM.—The fact that Conner owned no other building on that street, would not cure the defect.

APPEAL from the Superior Court of the City of San Francisco.

Montrose brought this action against Conner, to recover a claim against him for work and labor on the premises, in San Francisco, for which he had filed a notice of lien, in the office

of the county recorder, and made H. R. Payson a party defendant, as a purchaser of the property from Conner's grantee, subsequent to the completion of the work performed by him. Of plaintiff's lien, defendant Payson had no notice, except what was imparted by the record of the following notice:

"Know all men by these presents, that I, John B. Montrose, of the city of San Francisco, intend to hold a lien upon the dwelling-house lately erected by me, for John W. Conner, situated on Bryant street, between Second and Third streets, in the city of San Francisco, on lot —; the same being to secure the payment of the sum of six hundred and ten dollars, due me for labor and materials, performed and furnished in the construction of said building, the said sum being, by contract, due on the 20th September, A. D. 1855, at three per cent. per month, until paid.

"J. B. MONTROSE." [L. S.]

"SAN FRANCISCO, June 28, 1855.

"Sworn and subscribed before me, this 29th day of June, A. D. 1855.

[L. S.]

"T. A. LYNCH, Notary Public."

[345] *It was proven at the trial that Connor had no other lot or house on Bryant street.

The Court below ordered a sale of the premises, to satisfy the lien. The defendant Payson moved for a new trial, which being denied, he appealed.

Robert F. Morrison, for Appellant.

The notice of lien was fatally defective, for the reason that it contains no description of the property sought to be charged.

In support of his lien, the plaintiff introduced, in evidence, a notice which described the property as "a dwelling-house, lately erected by me, for John W. Connor, situated on Bryant street, between Second and Third streets, in the city of San Francisco, on lot——." Now, if such a description as this is a compliance with the the terms of the statute, it is difficult to conceive any kind of a description that would not be sufficient. "A dwelling-house on Bryant street, between Second and Third;" not even giving the number of the lot on which the dwelling was constructed. Now, on Bryant street, between Second and Third, there are three one-hundred-vara lots, to wit, eighty-five, eighty-six, and eighty-seven, and the notice of lien does not even inform us what fraction of any one of these three lots, with a front of seven hundred and twenty-five feet on Bryant street, the plaintiff claimed a lien upon. Could any body have ascertained, from an examination of the record, where the property was that was chargeable with the lien, except that it was somewhere in the city of San Francisco? Now, the law certainly intended, when it required the notice of the lien to be filed, that strangers might know, from an inspection of the record, and without being driven to the necessity of outside in-

quiries, the exact locality of the property on which the lien was claimed.

The Act of April 27, 1855, under which the plaintiff filed his notice of lien, requires that the party "shall also file, at the same time, a correct description of the property to be charged with said lien." (See Laws of 1855, 157.)

Why require a "correct description" of the property to be filed, but to give notice to the world, on the face of the record itself, of the identical property on which the lien is claimed?

The record is the only evidence that can be used to show a compliance with the requirements of the law, and, if it is defective, in any essential particular, the extraordinary right, which this law confers, does not exist. When a party seeks to maintain this unusual remedy; when he attempts to avail himself of this extraordinary lien, against one who has bought the property in good faith, and paid his money for it, the law should be most strictly construed, and the plaintiff should be held to rigid proof, that he has done all he ought to have done, to entitle him to condemn the property, for the satisfaction of his claim.

*How easy it would have been for the plaintiff to have [346] obtained a "correct description" of the property which he sought to charge with his lien, and how inexcusably negligent he has been in failing to obtain the necessary information; or, if he had it, in failing to place it on the record? To encourage such negligence as this, would be contrary to every principle of law and justice. To hold such a notice as this a compliance with the law, is to defeat its very language, as well as its spirit and meaning, and to remove entirely that protection which it is always the policy of the law to throw around *bona fide* purchasers.

John Reynolds, for Respondent.

As to the description of the property in the lien, it is proved that Conner had no other house on that street. The only object of a description is to designate the particular property intended by the description. Whether it is sufficient for that purpose, is a fact to be determined like any other fact.

The finding and opinion of the Court finds that, as a matter of fact, it is sufficient, and I think facts proven fully warrant the conclusion.

The testimony of the appellant himself clearly shows that the description was sufficient, if he had gone and looked at the records. He knew the receipt, which was shown him, related to the same property; and that he supposed it was a discharge of respondent's lien, and did not, therefore, examine the records. If he had examined the records, he would have found a lien filed exactly corresponding to the one of which he was apprised by the receipt. But, as the Judge below very properly says, in his opinion, he mistook the legal effect of receiving a draft. He supposed the receiving the draft discharged the lien, whether paid or not.

TERRY, J., delivered the opinion of the Court—BURNETT, J., concurring.

This was an action to enforce a mechanic's lien on a house in San Francisco, which was erected for defendant Conner, by plaintiff, who in proper time after its completion, filed in the recorder's office a notice of his lien.

Afterwards Conner sold the premises to defendant, Payson, who purchased *bona fide*, without actual notice of plaintiff's lien, and the question presented by the record is whether the description of the premises contained in the notice of lien filed with the recorder, was sufficient to give constructive notice.

"The act for securing the liens of mechanics and others," provides that every person desiring to avail himself of the benefits of the act, shall file in the office of the county recorder a notice containing a correct description of the property to be charged with the lien.

[347] *In the plaintiff's notice, the premises are described as "a dwelling-house lately erected by me for J. W. Conner, situated on Bryant street, between Second and Third streets, in the city of San Francisco, on lot ——."

This is not such a description as is contemplated by the statute; there are a number of lots on Bryant, between Second and Third streets, to any one of which it would apply as well as the one in question.

The fact that Conner owned no other dwelling on Bryant street, we think immaterial; besides, it does not appear from plaintiff's notice, nor is it shown that Payson, who is an innocent purchaser, for a valuable consideration, was aware of it.

Judgment reversed, and cause remanded.

COOK v. KLINK ET AL.

APPEAL.—MOTION TO DISMISS, WHEN TOO LATE.—A motion to dismiss appeal, on the ground that the transcript was not filed within the time required by the third rule of this Court, is too late after the case has been submitted.

HOMESTEAD, NOT AFFECTED BY MORTGAGE OF HUSBAND.—The homestead right is not affected by the foreclosure of a mortgage signed by the husband alone.

IDEM.—RIGHT, WHEN CANNOT BE TRIED.—The homestead right cannot be tried on a motion to set aside a sale under a mortgage. The husband and wife should have filed a cross bill in the foreclosure suit, or brought an ejectment-suit for the property.

¹ **IDEM.—RIGHT TO BE JOINTLY ASSERTED.**—The homestead right cannot be individually asserted; both parties must join.

APPEAL from the District Court of the Eighth Judicial District, County of Siskiyou.

A. S. Cook, the plaintiff in this case, filed his bill against the defendant Klink, to foreclose a mortgage, and made various in-

1. Cited *Larson v. Reynolds*, 13 Iowa, 584. See *Revalk v. Kraemer*, ante 66; *Kraemer v. Revalk*, ante 74; *Van Reynegan v. Revalk*, ante 75.

cumbrancers parties thereto. On the 20th of January, 1855, a decree of foreclosure was granted, and the mortgaged premises ordered sold. On the 21st of February, 1855, the premises were sold under the decree, the appellants in this case becoming the purchasers thereof. On the 6th of September, 1855, during the August Term of the Court, Klink gave notice to the appellants and others, of a motion to annul and set aside the decree and sale, on the ground that it was his homestead. On the 13th of September, 1855, the motion was heard. At the hearing thereof, Klink used as evidence, an application made by him on the 6th of February, 1857, for the benefit of the Insolvent Law, and the usual order made thereon by the Court, staying all proceedings against the insolvent petitioner.

The Court below, at this hearing, found that the property was the homestead of Klink; that it was not worth the sum of five thousand dollars; that his wife did not join in the execution of *the mortgages on which the order of sale was [348] based, and finally annulled and declared void the sale, and ordered that the appellants, on being served with a copy of the order, deliver up the possession of the premises to said Klink.

It was from this order of the Court that this appeal was taken.

Cartter & Hartley, and S. Heydenfeldt, for Appellants.

Cohen & Silverstein have appealed, first, upon the ground that the final judgment or decree of the Court cannot be amended, altered, or a new judgment entered, after the expiration of the term at which the same was entered. (*White and wife v. Williams*, Oct. T. 1856.) In this case, the final decree of foreclosure and sale being entered on the 10th day of January, 1855, and the motion for the setting aside the sale not made until nearly eight months after, the respondent will claim that the order staying all proceedings on behalf of the creditors, against said Klink, in his application for the benefit of the Insolvent Law, which was made by the Judge, on the 6th day of February, 1855, also stayed all further proceedings under the order of sale.

This Court, in the case of *Morrison v. Dapman*, 3 Cal. 256, uses the following language: "A Court may at any time render or annul a judgment, *nunc pro tunc*. but this power is confined to cases where the record discloses that the entry on the minutes does not correctly give what was the judgment of the Court," also, "although a Court may thus at any time make the entry conform to what was the judgment rendered, it will not be permitted after the lapse of a term, to open on motion, and render a new judgment; such a practice is too loose, and would give rise to much uncertainty."

In the case at bar, it is not contended by the respondents, that the decree is not the decree of the Court, as by it pronounced, and that it follows the prayer of the complaint in this

instance is proof that the decree was such a one as the Court intended, and did pronounce the record, in every respect, supporting the decree; hence, under the decisions of this Court, the Court below could not alter the judgment as it stood, or enter a new one after the term had passed at which the judgment was entered.

The circumstances and facts constituting a homestead should be submitted to a jury for their decision, and cannot be determined by the Court, on motion. The action of a party claiming exemption on the ground that the property is the homestead of his family and the mode of setting the same apart for such purposes, and the evidences which he has given either by preparing to or by living on the premises, all that shows an intention on the part of the claimant to dedicate a piece of property as a homestead; are matters of fact peculiarly within the province of

[349] a jury to determine whether such a dedication, did in good faith take place. I doubt whether another case can be found, assumed to pass upon so many questions of fact, as are in this case at bar, by the Hon. Judge before whom it was tried; the whole amounts to a special verdict—such as might have been found by a jury under the direction of a Court. In the case of *Cook v. McChristian*, 4 Cal 23, this Court asserts the right of the jury to determine the facts of dedication. On the foreclosure of mortgage in this case there was no attempt made to interpose the right of homestead against the decree and order of sale; the defendant Klink, though personally served, did not at that time in any way defend against the foreclosure and sale. If the premises were the homestead and dwelling-place of his family, it was his duty to have plead it as the privilege against sale; and so far as he is concerned, personally, if innocent purchasers have been vested with rights under the sale he could in no manner interfere in disparagement to those rights in his individual character, and the Court erred in trying, upon a motion made by the said Klink, against Cohen & Silverstein, the fact as to whether Klink had performed those acts in and about the premises, which would have amounted to their dedication as a homestead.

Cohen & Silverstein, the purchasers under the original sale, by virtue of the decree, not being parties to the original suit, cannot be ousted of their possession on motion.

The homestead being a joint estate, must be sued for jointly by the husband and wife. Neither, while the other was alive, could recover by a suit separately brought. By the action of dedication of the premises as a homestead, a joint estate was created: the alleviation, alteration, or incumbrance of the estate must, in all instances, be a joint act of the husband and wife; so in the recovery of the same, there must necessarily be a joinder of the parties in the suit. In the case of *Poole v. Gerrard*, 6 Cal. 71, this doctrine was held; if such be the law, the Court below erred in decreeing, upon motion made by Klink,

without joining his wife, the ouster of the said Cohen & Silverstein, and the restitution of the premises to the said Klink.

P. L. Edwards, for Respondents.

This appeal is not from a final judgment, and can only be allowable, if so at all, under subdivision three of section three hundred and thirty-six of the Practice Act, the last clause of which provides for an appeal from "a special order made after final judgment within sixty days after the order is made and entered in the minutes of the Court." See, also, last clause of section three hundred and forty-seven.

In the case of an appeal, either from a final judgment or order, the party intending to appeal, and wishing a statement of the *case to be annexed to the record, shall, [350] within twenty days after the entry of such judgment or order, prepare such statement, etc., and shall serve a copy upon the adverse party. The respondent may, within five days, prepare amendments, etc. If the amendments are not admitted, then the Judge, upon notice of two days, shall settle such statement. (Pr. Act, Sec. 338.)

An omission to prepare such statement, on the one hand, or such amendments on the other, shall be held as a waiver. (Pr. Act, Sec. 339.)

The statement, when settled, shall be signed by the Judge, with his certificate that the same has been allowed, and is correct. (Pr. Act, Sec. 341.)

In view of these provisions, it is submitted that the appeal is inadmissible, and ought to be dismissed.

If wrong in the foregoing conclusions, it is then submitted that there is no exception whatsoever presented by the record. In the supposed statement, it is said that the order under review was made, and that the appellants asked a rehearing, which was refused, and that they therefore appeal; but nowhere is there any exception to the action of the Court, and there can, therefore be nothing from which an appeal lies to this Court, save the judgment-roll. (*Johnson v. Sepulveda*, Jan. Term, 1855; *Egery v. Buchanan*, July Term, 1854.)

It is needless to cite authorities here to show that a purchaser of lands under an order of sale or execution must, at his own peril, know that the sale is made under a valid judgment, and that if the judgment is void, so is his purchase.

In the case of *White v. Williams*, this Court, in express terms recognized but one cause for which a Court ought to set aside or modify its judgment at a subsequent term, to wit: where the defendant was not summoned. This exception, it is presumed, is for the reason that the Court has acquired no jurisdiction of the person of the defendant, and the judgment is therefore void.

Now, it is respectfully submitted that the decision, although entirely correct in that case, does not, as reported, fully and fairly reflect the views of the Court *in extenso*.

If, in the case supposed, the Court can set aside or modify its judgment, at a subsequent term, because it is void for one cause, why not, when it is void for any other cause?

It is urged upon the other side that the right of homestead can only be ascertained by the verdict of a jury, and *Cook v. McChristian*, 4 Cal. 23, is adduced as authority for the position. Now, it will be remarked that the case cited was an ejectment, in which it was held that "the fact of the dedication of the premises in question as a homestead was properly submitted to the jury."

In the case now under review, no jury was demanded, [351] and if it had been demanded, it would not have been error to have denied the request; for, as before stated, this is emphatically a case in chancery, and where chancery has jurisdiction for one purpose, it will entertain the whole case and do entire justice between the parties. In such case the intervention of a jury is only tolerated. It is no matter of right. The refusal, even, of a jury, by the Court, is not error.

The mortgage of the homestead by the husband alone, was wholly void, except, perhaps, in favor of an innocent purchaser, without notice. (*Taylor v. Hargous*, 4 Cal. 268.)

A decree of sale under a mortgage executed by the husband alone, and sale thereunder, could have no more validity than his actual conveyance. And here the absence of notice is expressly negatived; for it is affirmatively shown that such notice was given at the time of the sale. Nor was the wife required to join in the proceeding to set aside the sale, or modify the judgment. The mortgage, judgment, and sale, as against her and the homestead, to the value of five thousand dollars, were wholly void. Otherwise the husband may, at any time by executing a mortgage, suffering a default, and refusing to join his wife in a proceeding to avoid his acts, entirely deprive her of the home which an enlightened Constitution and benignant Legislature have sought to secure her. Thus, the wife and children, who are the peculiar objects of regard, may be rendered houseless and homeless by the improvidence, willfulness, or caprice of the husband and father. But to the wife, under coverture, and the children under age, laches is not to be attributed. (*McHenry v. Moore*, Jan. T., 1855; *Sergeant v. Wilson*, Oct. T. 1855; *Poole v. Gerrard*, Jan. T. 1856.)

And upon general principles, if a sheriff sell upon a void judgment, his sale is also void. (1 Hill S. C. 493; 8 Wend. 36.)

The appellants insist that the homestead is the joint estate of the husband and wife, and that for its recovery they must sue jointly. And *Poole v. Gerrard*, Jan. T., 1856, is relied upon in support of the position. Now that, again, was an action at law. The husband and wife had executed several deeds for the property, and it was held that both deeds were invalid. The wife may not have been able to sue alone, at law, but is she therefore without remedy? If so, the husband has only to refuse to join her in a suit, and the whole law is avoided. On the part of

the respondent, it is insisted that the wife, in the proceeding under review, was not a necessary party. The mortgage, and all the proceedings thereon, were wholly void, both as against her and her husband. But even if such joinder had been proper, and could have been compelled, still, to be now available, the objection should have been made in some proper manner in the Court below. And if that Court had then erred, and the proper exception had been saved, then this Court [352] might act. Here, however the, applicants merely objected to the Court entertaining the motion, without stating any grounds of objection, and without saving any exception. Will this Court now interfere? (Pr. Act, Sec. 40; *Warner v. Wilson*, 4 Cal. 310; *Beard v. Knox*, 5 Cal. 252.)

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

Suit to foreclose mortgage. Decree January 20, 1855. Sale of premises under decree, February 21st, 1855. Property purchased by Cohen & Silverstein, no parties to the original suit. Motion to set aside sale, September 13th, 1855. Sale set aside, and Cohen & Silverstein appealed to this Court.

On the part of respondents, it is urged that the appeal in this case should be dismissed for certain causes assigned. The causes alleged would not seem to be sufficient, except the one that the transcript was not filed within the time required by the third rule of this Court. But no motion to dismiss having been made, and the case submitted, it is too late to make the objection in the brief. Had the objection been made by motion to dismiss, then the appellants might have been able to show some good reason in excuse for the failure.

The appellants insist that the judgment of the Court below should be reversed, upon these grounds: First, because the Court had no jurisdiction of the matter, as the term of the Court had expired, and one entire term had intervened between that and the term at which the motion was made; second, because defendant, Klink, was regularly summoned and failed to set up his right of homestead before the decree in the foreclosure suit; third, a motion to set aside the sale for the cause stated, was not the proper remedy.

The record in this case is not very accurately made up, and as there may be a doubt whether the notice of the motion was given during the term at which the decree of foreclosure was rendered, it will not be necessary to determine the first point.

As to the second ground taken by the counsel for the appellants, it appears that defendant, Klink, was duly served with process in the suit to foreclose the mortgage, and made no defense. It also appears that he made the motion to set aside the sale upon the general ground that the premises were his homestead.

If, then, he could make the notice to set aside the sale, without joining with his wife, then it would seem clear that he could

have set up the same matter in defense of the original action to foreclose the mortgage. And if he could singly avail himself of such a defense, he was bound to do so in the first instance; and having waived that right, he could not afterwards assert it.

[353] *But the proceedings in the foreclosure suit, did not affect the right of homestead, and the defendant, Klink, could not *individually* assert it. He had no right to set it up, either in the original suit, or in the form of a motion to set aside the sale.

These points were settled by this Court in the late cases of *Revalk v. Kramer*, ante 66 and *Kramer v. Revalk*, ante 74.

As to the third ground, we think it is well taken. The question of homestead is too grave a matter to be tried on motion. In this case, Klink and wife should have filed a bill in the nature of a cross bill in the foreclosure suit, or they should have brought ejectment.

Judgment reversed, and the cause remanded.

NAGLE v. HOMER.

ACCEPTANCE, CONDITIONAL.—Where a draft is accepted conditionally, to be paid upon happening of a contingency, whether the contingency has happened is a question for the jury.

IDEM.—DRAFT WHEN DUE.—A draft payable, in terms, out of an "appropriation" for work done by the acceptor, becomes due on payment for the work by government.

APPEAL from the Superior Court of the City of San Francisco.

The complaint alleges that the defendant is indebted to the plaintiff in the sum of eighty-six hundred and six dollars and sixty-seven cents, on a certain acceptance, or instrument, in writing, as follows:

"\$8,606 67.

SAN FRANCISCO, Jan. 31st, 1854.

"Please pay to my own order the sum of eight thousand six hundred and six dollars and sixty-seven cents, for value received, the same to be paid out of the appropriation, as soon as made, for the extra work done to the United States Marine Hospital building in this city, a statement of which has been made out and regularly forwarded by the proper authorities to the Secretary of the Treasury of the United States, to be laid before Congress at the present session; this sum being in full of settlement this day made, for the furnishing and laying the brick in said building, agreeable to the terms of the contract between C. Homer and myself.

GEO. D. NAGLE.

"To C. HOMER, Esq., San Francisco."

On the face of which is written as follows, in the handwriting of defendant: "Accepted, C. HOMER." And avers that the appropriation has been made, and the amount paid to the defendant, out of which the above draft was to have been paid, but

that the defendant refused to pay, etc., and claims legal interest *from the ——— day of ———, 1855, the time [354] of such appropriation and payment.

On the 5th of July, an answer was filed for defendant, denying generally all the allegations of the complaint, and claiming judgment against the plaintiff for two thousand dollars, for goods sold and delivered, and on an account stated.

The case came on for trial on the 18th of July, and the acceptance written across the face of the writing declared upon, being admitted to be the handwriting of the defendant, the evidence showed:

That in November, 1851, the defendant contracted with the United States to erect the marine hospital in San Francisco, and complete it in one year, for one hundred and forty thousand dollars; that he was not furnished with a site until December, 1852, more than a year after, and has preferred a claim for damages in consequence, which is now pending, for upwards of forty thousand dollars; that there were two or three supplemental contracts; that the original contract provided that the walls were to be built hollow, and the last supplemental contract provided that they should be built solid, and that the defendant should be paid fifty-five dollars per thousand bricks, for all the extra brick-work required in consequence; but that he should wait for payment until Congress made an appropriation therefor; that for this extra brick-work, and other extra work performed about the building, the defendant made out a statement claiming about sixty thousand dollars, which has been forwarded to the Secretary of the Treasury, who has laid it before Congress for action; that the defendant has received the whole amount heretofore appropriated by Congress, on account of the building, and at various times during the progress of the work received sums of money on account of extra work, such as digging a well, laying drains, and grading, etc., amounting to some forty thousand dollars in all; but that he has not received any money on account of the two claims referred to; that no appropriation has been made by Congress therefor, and he is now in Washington urging the allowance of those claims. That an examination of the building had been made by Z. B. Tower, a captain and brevet-major in the United States army, under instructions from the Secretary of the Treasury of the United States, and the said Tower reported that in his opinion Mr. Homer had been paid all that the work and material in the building were worth; that his examination was *ex parte*, and no one was present on behalf of Mr. Homer, and that all his information as to payments to Mr. Homer, had been derived from papers forwarded to him by the Secretary of the Treasury at Washington. That the defendant had sold to plaintiff a lot of piles, for which the plaintiff was to pay two thousand dollars, but the witness *was of the impression that the amount was to be credited [355] on the instrument now in suit.

The defendant moved for a nonsuit, which was refused.

The Court charged the jury that it was for them to say whether the time when the note was to become due had arrived, and how much was due, to which the defendant excepted.

The jury found a verdict for plaintiff for six thousand six hundred and six dollars and sixty-seven cents.

A motion was made for a new trial, and overruled by the Court. Defendant appeals.

Cyril V. Grey, for Appellant.

A plaintiff must recover, if at all, according to the averments in his complaint, and a Court is not warranted in rendering a judgment in favor of the plaintiff when there is no averment in his complaint upon which the judgment can be based. (*Sterling v. Hanson*, 1 Cal. 478; *Mickle v. Sanchez*, 1 Id. 200.)

No principle is better settled than that the allegations and proofs must correspond. (*Cotes v. Campbell*, 3 Cal. 191; *Lewis v. Meyer*, 3 Id. 475; *Moor v. Teed*, 3 Id. 190.)

"The contract was to deliver sound rice. The plaintiffs failed to prove it was sound, and therefore did not make out their case." (*Ruiz v. Norton*, 4 Cal. 355.)

The evidence of the witness Tower, as to payments to the defendant—such evidence being what he had learned from the papers forwarded to him from Washington, ought to have been excluded. No connection between the defendant and those papers had been shown. The witness also said expressly, that he had not derived any knowledge on the subject of which he testified, from the defendant.

The testimony of the same witness as to the value of the work done by the defendant ought to have been excluded.

He was not shown to be an expert, but an officer of the United States making an examination for the government. The defendant was not present at the examination. The evidence was irrelevant.

The testimony of the same witness ought to have been stricken out on motion of the defendant's counsel.

It was shown that the payments to which he had testified, purported to have been made by Major Hammond, a resident of San Francisco, whose attendance could have been secured.

The plaintiff ought to have been nonsuited. The plaintiff's evidence showed that the time of payment fixed by the plaintiff in the draft on which he had declared, had not arrived.

The Court ought to have instructed the jury to find a verdict for the defendant. The evidence of the defendant strengthened that already given by the plaintiff, showing that the claim [356] of *the defendant out of the appropriation for which the plaintiff's demand was to be paid, was still pending and unsatisfied; there was not a particle of evidence that the said claim had been paid; no appropriation to pay it had been or could be proved, and the defendant had proved a just demand against the plaintiff for two thousand dollars.

Robt. F. Morrison, for Respondent.

The defense made is, that the contingency on which the draft was to become due, had not occurred at the time the action was brought.

This is purely a question of fact, and as it has been found by the jury in favor of the plaintiff, very strong reasons must be presented in the record, to justify this Court in saying that their finding was not true. It is insisted, on behalf of the appellant, that it is entirely immaterial, so far as the merits of this case are concerned, whether Congress ever made any appropriation or not.

When the draft was drawn, it was contemplated by both Homer and Nagle, that when Homer got his pay from the government, Nagle should be compensated for his work done upon, and the materials furnished by him for, the marine hospital. Now, can it be doubted, that this was the intention of the parties?

If, then, such was the intention at the time the draft was drawn, it is a cardinal rule of construction, that such must be the meaning of the instrument sued on.

Let us see, then, whether Homer has been paid by the government.

The proof shows, that according to the terms of the original contract, between the government and the appellant, in this case, the latter was entitled to receive, for building the marine hospital, one hundred and forty thousand dollars. If Homer received more than this amount, it must have been, and the proof clearly shows that it was, for, and on account of extra work; work that was not stipulated for in the original contract.

Well, then; the proof is, that Homer, the appellant, was paid by the government two hundred thousand dollars; sixty thousand dollars of which was for extra work, and a large amount of this was paid him, Homer, after the draft was drawn. The date of the draft is ———, and it appears, from the testimony of Paul, that Homer continued to receive payments, down to the time of his departure from California, in ———, 1854.

Here we have sixty thousand dollars paid for extra work, and still the appellant contends that the draft is not due; because, forsooth, Congress has not made an appropriation. Are we to lose our claim, simply because Congress has not acted in the matter? Was it the passage of an appropriation bill, that the *parties had in view, when they made the settle- [357] ment, and drew the draft? No; it was the payment of the money that they thought about, and it could not have entered into the imagination of either the plaintiff or defendant, as a matter of any importance whatever, whether the money was paid by the Secretary of the Treasury, with or without an appropriation by Congress.

But, if our claim was not due, at the time the action was commenced, when will it be due?

Does the testimony in the case show, that Homer is entitled

to one single dollar more than he has received? No; but, on the contrary, it distinctly appears that he has been fully paid, and that the authorities at Washington will not allow him to have any more.

"The Supreme Court will not disturb the order of an inferior Court, in granting or refusing a new trial, unless manifest error shall appear." (*Bartlett v. Hogden*, 3 Cal. 55.)

"It is only in cases where the verdict of the jury strikes the mind, at first blush, as palpably and manifestly contrary to evidence, that the Court will, for that reason, interfere to set it aside." (*Dawson v. Robbins*, 5 Gil. 72.)

"A Court will not grant a new trial when, in its opinion, substantial justice has been done between the parties, though the law arising on the evidence would have justified a different result." (*Smith v. Shultz*, 1 Scam. 491.)

"It does not always follow, that a new trial will be granted, even if the jury find against the weight of evidence—against the instructions of the Court, or through misdirection of the Court, on a point of law, provided the Court is satisfied that justice has been done." (*Leigh v. Hodges*, 3 Scam. 18.)

"A new trial will not be granted against strong circumstances of equity." (2 McLean, 253.)

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

The plaintiff declared upon the following instrument in writing:

\$8,606 67.

SAN FRANCISCO, Jan. 31, 1854.

Please pay to my own order the sum of eight thousand six hundred and six dollars and sixty-seven cents, for value received, the same to be paid out of the appropriation, as soon as made, for the extra work done to the United States hospital building, in this city; a statement of which has been made out and regularly forwarded, by the proper authorities, to the Secretary of the Treasury of the United States, to be laid before Congress at the present session; this sum being in full of settlement this day made, for the furnishing and laying the brick, in [358] said building, *agreeably to the terms of the contract between C. Homer and myself.

GEO. D. NAGLE.

To C. HOMER, Esq., San Francisco.

On the face of which is written, as follows, in the handwriting of defendant: "Accepted, C. Homer."

The complaint avers that the appropriation has been made, and the amount received by the defendant, out of which said draft is payable, and prays judgment for the same, with interest from the date of said appropriation.

Under the proof in the case, the only question for the jury to determine was, whether the contingency had happened, upon

which the draft would become due. The appropriation made by Congress, for the hospital, was one hundred and eighty thousand dollars, and the first contract with Homer amounted to one hundred and forty thousand dollars. There were two supplemental contracts, for specific sums, but the amount is not shown in the record. There was a third supplemental contract, providing that the walls (which, by the original contract, were to be hollow,) should be built solid, and the contractor was to receive fifty-five dollars per thousand, for the extra bricks, and to wait until Congress made an appropriation therefor. The whole amount paid Homer was some two hundred thousand dollars; some sixty thousand dollars had been paid him beyond the sum mentioned in the original contract, and twenty thousand beyond the appropriation made by Congress.

The plaintiff contends that the understanding of the parties was, that he should be paid as soon as the defendant received compensation for the work from the federal government; and although the contract looked to an appropriation by Congress, still, if the money was paid by the proper department, he was then entitled to receive the amount due, and could not be required to wait for an act of Congress, to pay a debt which had already been satisfied.

This position of the plaintiff would seem to be correct. It is true that the draft was stated to be due when the appropriation should be made. But an appropriation was only a means to reach the end contemplated by the parties, namely: the payment to Homer, for the extra brick-work. It was the payment to Homer that made him liable to Nagle. It does not matter whether Homer was paid in one form, or another, so he was paid.

Whether Homer was paid for the particular extra work, was a question of fact for the jury. Other extra work had been done by the defendant, and whether the payments he received for extra work were partly for this extra work, was a question in reference to which there was a conflict of testimony. The jury *having found for the plaintiff, and their being tes- [359] timony of the other witnesses, we cannot disturb their verdict.

As to the objection to the admission of the testimony of Maj. Tower, we think it is not material, as no injury could have been done by the introduction of those portions which might not have been strictly proper. Taken in connection with the testimony of the other witnesses, no injury was done to the defendant.

Judgment affirmed.

PEOPLE v. GEHR.

CHALLENGE, FOR CAUSE.—A challenge for cause is warranted where the juror, on his *voir dire*, states that it would require proof to change the opinion then existing in his mind.

IDEM.—The fact that the juror says that he could try the cause impartially,

will not make him competent. The life or liberty of a citizen is not to be committed to the decision of those whose prejudice and pride of opinion are enlisted against him.

APPEAL from the County Court of Nevada County.

Indictment for robbery.

On the trial of this cause, one R. R. Craig, who was being examined upon his *voir dire*, touching his qualification as a juror, answered that he had formed and expressed an opinion as to the guilt or innocence of the prisoner, and that he then believed the prisoner to be guilty of the offense charged; that this opinion was formed from rumor, on the supposition that the rumor was true, and that testimony would alter or remove it; that he thought he could try the case without bias or prejudice, but it would require proof to change the opinion then existing in his mind.

The defendant challenged the juror for cause; the challenge was denied, and defendant excepted.

The defendant was convicted, and sentenced to ten years' confinement in the State prison, from which judgment he took this appeal.

Belden & Yant, for Appellant.

The case of *The People v. McCauley*, 1 Cal. 385, can doubtless be considered the extreme limit to which antecedent impressions as to the matter in issue can be carried without disqualifying as a juror. The subsequent cases of *The People v. Stewart*, January Term, 1857, and *People v. Nathan Cottle*, July Term, 1856, are the very proper modifications of the extreme rule laid down in the case first cited, it will be seen, however, from the record, that even the decision in the McCauley case is far from sustaining the ruling of the Court in the case at bar, especially if the reasoning upon which our statute was framed be taken [360] into con-sideration. In *People v. Bodine*, 1 Denio, 281, referred to by this Court as explanatory of our statute, it will be seen that the instructions of the Circuit Judge (which were afterwards made the basis of the enactment) amount to this, that the formation of a fixed and decided opinion, such as it would require evidence to remove, of the guilt or innocence of the prisoner, disqualified as a juror, and that the declaration of the party that he could try the cause without bias, did not render him competent. The term "decided" in this opinion must be regarded as explaining and controlling the word "fixed," for if the latter is to receive its ordinary signification of unalterable or immovable, it would be impossible to disqualify a juror. There are few propositions deduced from facts, by reason and analysis, which amount to demonstration, and that opinion which is founded in less, must be changeable. The ruling of the Circuit Judge must not be construed to mean a fixed and unalterable conclusion, but that the mind of the juror, acting upon the rumors and reports in circulation, and judging from

these as its premises, had formed an opinion from which it would not free itself, but that other or external evidence must be adduced to change or overthrow the conclusion to which it had arrived. In the case at bar, the juror does not give his sentiments, as opinion, but declares them as belief—and between the opinion and belief, a well-defined distinction is drawn. Both terms are employed in our statute, but both justice and reason require that in the enactment, belief should be construed as synonymous with persuasion or opinion. As defined by Webster, opinion is the assent of the understanding gained by evidence of probability; which rather inclines to one persuasion than another, yet not without a mixture of uncertainty or doubt. Belief, upon the other hand, is termed a persuasion of the truth, or assent of the mind to the truth of a declaration, proposition, or alleged fact, on the ground of evidence distinct from personal knowledge. Opinion may, therefore, be considered the inclination of the mind toward one of several propositions, while belief is the conclusion as to one to the exclusion of the others. In the one, its bias may be changed or removed by its own reasoning powers, but in the other, it rests in its deductions, and external influences can alone change it; that this belief was founded upon reports and rumors, does not change its disqualifying effect. Its existence is what renders the juror incompetent, not why it exists. That he has judged hastily or reasoned superficially, the Court cannot decide. A Newton or Locke may, by metaphysical analysis, arrive at a conviction, which, with another, is mere impulse or conjecture; yet facts, which force the philosopher from his position, might be powerless and futile with the other. The tenacity with which the mind clings to its own deductions, is dependent upon causes of which neither Court nor counsel can be cognizant. The character of the man, his confidence in his informant, his [361] personal knowledge of the accused—these, and numberless others, are the hidden defenses of his position, against which, evidence, argument, and instruction, are alike powerless. In such a case, of what benefit to the prisoner is the time and law-honored presumption that he is innocent until proved guilty? Of what advantage the instructions of the Court, when a conclusion, which should only be derived from law, as applied to legal evidence, existed antecedent to either? Nor does the juror's declaration that he can try the cause without bias, change his position; if the state of his mind, as laid before the Court, exhibit bias or prejudice, his own denial of its existence can no more change the fact than it would were he to deny his presence before the Court. Belief is, also, as I have shown, a conclusion of the mind, and to assert that it does not favor, and is not biased, in support of its own deductions, is to utter a fallacy; nor is the juror to determine his own competency. Bias is a question of both law and fact, and from both the Court is to decide as to competency; to permit a juror, whatever prejudice his examination may have elicited, to qualify himself by a general

declaration that he would, or could be governed by evidence, would make challenges for cause a mere farce. As to whether our peremptorily challenging those jurors whom the Court decided qualified, and not exhausting our challenges in completing the panel, causes the error of the Court, in forcing us to excuse, as a matter of favor, what we were entitled to as of right, I would only say that such a rule is virtually declaring that no challenge for cause can properly or safely be interposed until the prisoner's peremptory challenges are exhausted. In the case of *People v. Bodine*, before referred to, this question is so ably discussed, by both Court and counsel, that reference to that decision must suffice. (1 Den. 281.)

TERRY, C. J., after stating the facts, delivered the opinion of the Court—BURNETT, J., concurring.

The decision of the Court upon the competence of the juror, was directly in conflict with the statute law, as well as the former rulings of this Court. (See *People v. Cottle*, 6 Cal. 227; and *People v. Stewart*, 7 Cal. 140.)

The Act to regulate proceedings in criminal cases, section three hundred and forty-seven, prescribes as cause of challenge to a juror, the "having formed, or expressed an unqualified opinion that the prisoner is guilty or not guilty of the offense charged."

The Legislature, by this enactment, evidently designed to secure the parties charged with crime, a fair and impartial trial before an unprejudiced jury, by excluding from the panel all persons who, by reason of having formed or expressed an [362] opinion, *would probably feel an undue bias, and be incompetent to weigh impartially the testimony, and arrive at a correct conclusion.

It is well known that there is in the minds of most men, a desire to be thought consistent, which induces them to adhere with tenacity to views once entertained, and expressed; the law has therefore wisely ordained that the life or liberty of a citizen shall not be committed to the decision of those whose prejudices and pride of opinion are enlisted against him.

In the present case the juror admitted, that at the time of his examination, he believed the prisoner guilty of the offense charged, and that it would require proof to change this opinion.

The principle of the law, founded in humanity and justice, presumes the accused to be innocent, and he is not put upon his defense, until his guilt is *prima facie* established by evidence; in the mind of the juror, this principle was reversed, and the accused was already held to be guilty, even before a single witness had testified against him.

The fact that the juror further said, that he could try the cause impartially, was entitled to no consideration; few men will admit that they have not sufficient regard for truth and justice to act impartially in any matter, however much they may

feel in regard to it, and every day's experience teaches us that no reliance is to be placed in such declarations.

Nor is the fact that the opinion of the juror was formed merely from rumor, any argument in favor of his competency. The statute excludes all who have formed or expressed an unqualified opinion upon the question of guilt, whether the opinion is formed from rumor or from the evidence, or from personal knowledge.

In fact, the rights of the accused would probably be much safer in the hands of a juror whose opinion had been formed from a partial knowledge of the testimony, than of one who was capable of forming and expressing a fixed and unqualified opinion in matters of such moment from mere idle rumor.

The judgment of the Court below is reversed, and a new trial ordered.

***MITCHELL v. STEELMAN ET AL.**

[363]

MORTGAGE ON VESSEL, NOTICE OF.—Where A., the owner of a sea-going vessel, executes to B., a mortgage thereon, which is recorded in the custom-house of her home port, B. commences suit to foreclose the mortgage, and makes C. a party defendant thereto, on the ground that he has purchased the vessel, subject to the lien of plaintiff's mortgage, C., in his defense, avers that the mortgage was void under our Statute of Frauds, and that he now held the vessel discharged from the same: *Held*, that the mortgage was a valid lien, and that the record of the mortgage was sufficient notice thereof to C.

COMMERCE—POWER OF CONGRESS, WHEN EXCLUSIVE.—The power of Congress to regulate commerce, is exclusive, when exercised. The Act of Congress of July 29th, 1850, authorizing mortgages of this kind to be recorded, and making the record thereof notice to third parties, being in conflict with our Statute of Frauds, the latter must yield.

MORTGAGE—STATUTE OF FRAUDS.—Where notice of a mortgage is had by a subsequent purchaser or mortgagor, he is not protected by our Statute of Frauds.

APPEAL from the Superior Court of the City of San Francisco.

The defendant Steelman, on the 12th day of June, 1854, executed to William B. Swain, his promissory note for one thousand two hundred and fifty dollars, and, to secure the payment of the same, executed to Swain a mortgage, upon the schooner Fal-mouth. The mortgage was duly recorded in the records of mortgages, in the custom-house, at San Francisco, and the note and mortgage were afterwards, on the 30th day of April, 1855, assigned by Swain to the plaintiff. The schooner was permitted, by the holder of the note and mortgage, to remain in the possession of Steelman, who sold his interest in the vessel to the defendant Lawrence, on the 6th of December, 1855. The plaintiff brought his action to foreclose his mortgage, and defendant Lawrence was made a party, as claiming an interest in the

1. Approved *People v. Raymond*, 34 Cal. 498, citing many cases; *White's Bank v. Smith*, 7 Wall. 656.

mortgaged property. Lawrence demurred, and answered at the same time; the demurrer was overruled, a trial had upon the merits, when judgment was rendered for plaintiff against Steelman, and a decree entered that the vessel be sold, and the defendant Lawrence appealed to this Court.

There was testimony which satisfied the Chancellor that the defendant Lawrence had purchased the interest of Steelman, in the vessel, subject to the mortgage, which he expressly promised to pay.

Calhoun, Wise & Della Torre, for Appellant.

This is a bill in equity, and should be judged by the rules of equity pleading, where the code does not interfere.

The only part of the complaint which contains a charge against the defendant Lawrence, is in these words:

"And plaintiff further avers, that said defendant Lawrence *has purchased the said schooner, subject to the lien of said mortgage, and now holds the same."

This is insufficient. It states a conclusion of law instead of facts, whence the conclusion is to be drawn. It admits of no mode of answer, except a general denial. The plaintiff's bill must show, by the facts it charges, that defendant is liable. This is so elementary, that citations may be made to books on pleading—*passim*. (*Mitford*, Story's Eq. Pl.; *Dan. Ch. Pr.* See *Ryves v. Ryves*, 3 Ves. 343; *Crossing v. Honor*, 1 Term Rep., 180; *Lord Uxbridge v. Strucland*, 1 Ves. 56; 3 Mer. 503.)

On the case made at trial, defendant Lawrence was entitled to a decree, and the bill ought to have been dismissed against him.

The Judge thinks notice of a prior mortgage was proved against him.

But admitting the testimony of Swain, and the wisdom of the statute becomes apparent. A mortgage is given of the vessel in her home port, and for over eighteen months, although she is here trading all the while, no possession is either taken, or attempted by the mortgagee.

This Court interprets our Statute of Frauds strictly. (See *Calderwood v. Abell*, 4 Cal. 90, and the admirable argument of the Court.

Fitzgerald v. Gorham, 4 Cal. 289, does not allow even a "constructive" change of possession to be sufficient to avoid legal fraud under our statute. The change must be "actual." See *Meyer v. Gorham*, 5 Cal. 322, covenant in the mortgage itself cannot dispense with the necessity of possession.

It is supposed that vessels, being a peculiar species of property, ought not to be bound by this sale. It is sufficient that our State has thought fit to include them; by section eighteenth of the statute, possession must be taken. Here, the mortgage was made between citizens of California, and at the home port of the vessel while she was at the wharf at San Francisco, and she has been habitually at that port ever since.

But it is finally contended, that the mortgage having been recorded under the Act of Congress of 1850, possession under our State law was dispensed with. If this be so, it can only be because the Act of Congress operates a repeal of our Statute of Frauds, so far as vessels are concerned. This power in the federal government could only exist under the grant of the power to regulate commerce. It might be a grave question how far the Constitution would extend to enable Congress to repeal the law of a State in relation to the title to personality in its own forum. But, it is considered the question does not arise in this case. It admits of an easier solution. A ship is not only an instrument of commerce, but an object of property. As an instrument of commerce, it can be regulated by Congress, as for instance, by the Navigation Acts. Does this prevent [365] a State from requiring certain evidences of fair dealing in their transfer, when the question is raised in its own forum?

The act of Congress of 1850, is not conclusive nor exclusive. It only provides for mortgages being invalid in certain cases, and unless certain conditions be complied with, a State must have the clear right to superadd other conditions in its own forum, and between its own citizens. (See the opinion of the Supreme Court U. S. per BARBOUR, J., 11 Pet. 141, etc., in *City of New York v. Miln.*)

"The instrument of navigation, that is the vessel, when within the jurisdiction of the State, is liable by its laws, to execution." "The State has a right to vindicate its criminal justice against the officers, seamen, and passengers who are within its jurisdiction, and also in the administration of its civil justice, to cause process of execution to be served on the body of the very agents of navigation, and also on the instrument of navigation, under which it may be sold, because they are within its jurisdiction, and subject to its laws."

"Each of these laws depends upon the same principle for its support; and that is, that it was passed by the State of New York, by virtue of her power to enact such laws for her internal police, as it deemed best; which laws operate upon the persons and things within her territorial limits, and therefore, within her jurisdiction."

As to the right of a State to prescribe laws for title within her limits, and in her own forum, see *Warren Norris v. Johnson*, January, 1856, p. 98, Cal. Sup. Court.

At all events, in the case of *Davidson v. Gorham*, October, 1856, the Supreme Court of California held, that in order to take advantage of this very act of Congress, the complaint must set out all the facts which bring the case within the act. In the present instance this has not been done, and of course the act cannot be applied.

State can tax instruments of commerce. (*Nathan v. Louisiana*, 8 How. 73.)

In *Davidson v. Gorham*, this Court decides, that everything necessary to constitute a vessel of the United States, must ap-

pear affirmatively. The Court can never know that a vessel is a vessel of the United States; that she has been enrolled or registered; that she was mortgaged when she was enrolled or registered, and before she changed her port, and while she was the property of the same person, unless it is affirmatively pleaded and proved.

Is the law of Congress constitutional? It is claimed that Congress has the power, from the clause regulating commerce.

What is the meaning of regulating commerce? Does it [366] mean *regulating property? Is property commerce, and commerce property?

Now, it must be clear that they cannot regulate property. It is useless for us to show what it means. We may stop here. The authorities cited by the respondent will be found not to sustain his case.

H. B. Janes, for Respondent.

The pleadings and proofs show the vessel to have been a sea-going vessel, enrolled for the coasting trade—a vessel of the United States, at sea “most of the time.” That possession was delayed after the mortgage, at request of appellant, and for his benefit. This waiver he now seeks to avail himself of to plaintiff’s prejudice. This is a proceeding in equity, and is to be adjudicated as such.

Defendant Lawrence had due and legal notice of the mortgage, became a party thereto, and took the vessel subject thereto.

Our Statute of Frauds does not require that the mortgagee should take possession of a vessel upon the execution of a mortgage. The seventeenth section does not declare a mortgage void in default of possession, but provides “that it shall not be valid against any other persons than the parties thereto.” And this is qualified by section eighteen, which provides that the mortgagee shall take possession of the class of vessels, such as this is shown to be, “as soon as may be after their return to port.”

Those words, “as soon as may be,” have meaning determined by judicial decisions, and all the circumstances of the case are to be taken into consideration, in determining whether a mortgagee has forfeited his right to the vessel by his delay in taking possession. (*Joy v. Sears*, 9 Pick. 41; *Gardner v. Hewlan*, 2 Pick.; *Wheeler v. Sumner*, 4 Mas. 185; *Abbott on Shipping*, mar. 31, and note, and authorities there cited.)

If, then, as to third parties generally, the time of taking possession of a mortgaged vessel is left to be determined by all the circumstances of the case, how can a Court of Equity favor a defendant who secures the delay in taking possession for his own advantage, and, after profiting by it, seeks to use it as a means of depriving a mortgagee of his just rights?

“The mortgagee, by waiving his right to possession, only takes the risk that the mortgagor will not impose upon an innocent purchaser. This is all his risk.”

The policy of all maritime nations is to keep their vessels actively employed, and every inducement is held out to prevent obstacles being opposed to their active service. (Benedict's Adm., p. 157, Sec. 277, and Molloy, 308; Abbott on Shipping, mar. 100; Flanders on Shipping, 358; 11 Pet. 175.)

Such interpretation of our Statute of Frauds, is not inconsistent with all the rulings cited by defendant's counsel, as to possession of mortgaged chattels by mortgagee, [367] as all such strictness is expressly waived by our Statute of Frauds, as to vessels.

The mortgage of the vessel is valid and binding upon all interested, without possession in the mortgagee at all. It is a mortgage of a vessel of the United States, duly enrolled and recorded according to the Act of Congress, A. D. 1850, regulating the recording of mortgages, etc.

Appellant's counsel avoids the discussion of the power of the federal government to regulate property in vessels, because he is satisfied with an easier solution, inasmuch as the right of Congress, under the Constitution, to regulate commerce, only affects vessels as "instruments of commerce," (vehicles, I suppose, is meant,) "not in any of their incidents as property."

I admit that the power of Congress to regulate commerce does not extend to vessels belonging wholly to the internal commerce of a State, and not enrolled for the coasting trade, or registered for the foreign trade.

But the same principle which excludes the general government from interfering with vessels purely local in character, excludes the interference of a State with enrolled vessels of the United States, engaged in the coasting trade, or registered vessels, engaged in foreign trade. It will not be disputed that "a State cannot, in any way, interfere with vessels engaged in foreign commerce," for the States are unknown to foreign nations. But the power to regulate foreign commerce is given in the same words, and the same breath, as it were, with that over the commerce of the States, and with the Indian tribes. "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." (U. S. Constitution, Sec. 8; *Gibbons v. Ogden*, 9 Wheat. 585, 586; 3 ed. 1851.)

In the case last above cited, the subject is fully considered by the United States Supreme Court. Chief Justice MARSHALL and Justice JOHNSON delivered the opinions. The following points, are there expressly decided:

1. The power to regulate commerce, as far as it extends, is exclusively vested in Congress, and no part of it can be exercised by a State.

2. The power to regulate commerce extends to every species of commercial intercourse between the United States and foreign nations, and among the several States. It does not stop at the external boundaries of a State, but it does not extend to commerce completely internal.

3. An enrollment of a vessel confers a national character, and entitles the vessel to be classed as a vessel of the United States, just as registration confers a national character upon vessels destined for ports in foreign countries.

4. Vehicles of commerce are a subject of commercial [368] regulation. In the case cited, Judge JOHNSON says.

"Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce. The subject, the vehicle, the agent, and their various operations, become the object of commercial regulation. The power to regulate commerce, granted by the Constitution to the federal government, was that power to regulate commerce which previously existed in the States. What was that power? The States were unquestionably supreme, and each possessed that power over commerce which is acknowledged to reside in every sovereign State."

Another authority upon national jurisdiction over vessels as property, is Pardessus, one of the leading writers upon commercial law. Among the general maritime incidents of a vessel to which national jurisdiction attaches, he enumerates "everything relating to the means of acquiring title to them." (1 Pardessus, Droit Com. p. 81.)

To the same point is the decision "that States, as such, have no ships or vessels." (1 Wheat. 409; Benedict's Admiralty, Sec. 273.)

The jurisdiction and laws of the United States having once attached, accompany the vessel within the limits of another sovereignty. ("The Creole," Diplomatic and Official papers, pp. 85, 86; cited also in full in Flanders' Maritime Law, p. 39, Sec. 54, note.)

In this case of the Creole, which was a subject of correspondence between Mr. Webster, while Secretary of State, and Lord Ashburton, the British Minister at Washington, the former maintains—"That the vessels of a nation are considered as parts of its territory, and that her jurisdiction and laws accompany her ships, not only over the high seas, but into ports and harbors, or wheresoever else they may be water-borne."

To make vessels dependent upon local statutes, would render them so entirely insecure, as to prevent the use of that class of securities in commercial transactions, and of consequence greatly impede, if not actually destroy commerce, which from its very nature demands, that not only the rules of navigation should be prescribed by national laws, but also all the incidents of the property conveyed, and the vessels that convey.

If a State may strip a vessel of the privileges resulting from a right granted by its enrollment, as it could do were the power contended for conceded, it might also destroy the right itself, and the now general regulations under which a vessel may navigate the waters among the different States, would become merely local laws, changing upon the entry of the ves-

sel into every State, and perchance, into each different port of the same State, thus virtually destroying the coasting trade.

*BURNETT, J., after stating the facts, delivered the opinion of the Court—TERRY, C. J., concurring. [369]

The complaint alleges the execution of the note and mortgage, both of which are set out in full, and also the recording of the mortgage. There is no allegation in the complaint, that the vessel, (except a recital of that fact in the copy of the mortgage) had been enrolled, and the only allegation in reference to the defendant Lawrence was this: "And plaintiff further avers that defendant Lawrence has purchased the same brig, subject to the lien of said mortgage, and now holds the same."

It is insisted, by the defendant Lawrence, that this allegation is insufficient to show any cause of action, as against him, as it states a conclusion of law, and not of fact, in alleging that he purchased subject to the mortgage.

There is certainly much force in the argument of counsel. It is well settled that the pleadings should state facts. The best pleading, and the most consistent, is a simple narration of the facts necessary to constitute a cause of action. But where more facts are stated than required, it is no ground of demurrer. Mere surplusage is not a ground of demurrer, but of a motion to strike out. (Sec. 57.) A defendant can only demur for the causes specified in section forty.

To ascertain whether an allegation be sufficient, it is always necessary to remember the end for which it is made. In this case, the only object of the allegation was to show a sufficient interest in Lawrence to make him a party. The object in making him a party was to settle any claim he might choose to set up to the property mortgaged. The intention was to avoid a multiplicity of suits. In cases like this, a very slight allegation is necessary. The claim of defendant must be affirmatively set forth by him in his answer. (Pr. Act, Sec. 46.) The plaintiff is supposed not to know the particulars of the defendant's adverse claim. All that is required of the plaintiff is, to state enough to show that the particular defendant claims an interest in the mortgaged property. In this case, if we strike out the words "subject to the lien of the mortgage," the allegation would be sufficient for the purposes intended. As against the adverse claim of Lawrence, the position of the plaintiff was substantially that of a defendant.

But by far the most important questions arising upon the record are two, and may be stated thus: First, was the record of the mortgage sufficient notice to Lawrence? Second, if not, was actual notice to him sufficient, under our Statute of Frauds, to defeat his purchase, as against the lien of the mortgage?

These questions, it is thought, have never been determined by this Court, and are certainly difficult, as well as important. The seventeenth section of our Statute of Frauds, passed April 19th, 1850, Com. L. 201, provides that "no mortgage of per-

[370] sonal *property, heretofore made, shall be valid against any other person than the parties thereto, unless possession of the mortgaged property be delivered to, and retained by, the mortgagee." The next section makes an exception in favor of contracts of bottomry, respondentia, and assignments, and hypothecations of vessels or goods at sea, or in foreign States, or without this State; provided, the assignee or mortgagee shall take possession of such vessel or goods, as soon as may be after the arrival thereof within this State.

The first section of the Act of Congress passed July 29th, 1850, 9 United States Statutes at Large, 440, provides that no bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person, other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance, be recorded in the office of the collector of the customs, where such vessel is registered or enrolled.

Among the powers conferred upon Congress, by the eighth section of the first article of the Constitution is, the power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The first inquiry arising under the first question is, whether the provisions of our statute, and those of the Act of Congress, are necessarily in conflict. It is insisted by the learned counsel for the defendant, that there is no necessary conflict, and that, therefore, the provisions of both may stand. It is also substantially contended, that conceding there is a necessary conflict, the provisions of our statute should stand, as it only assumes to regulate the evidence of title to the vessel, and not the manner of its employment; and that the subject of title to a vessel regularly enrolled and licensed, either for foreign or coasting trade, is a matter legitimately within the control of the several States, and not within the power of Congress.

It will be seen that the Act of Congress and our Statute relate precisely to the same thing, and that these provisions are different in their character. To give effect to both, we must carry out the intention of each. If the clear intention of both Acts can be fully carried out, and practically applied, then there is no necessary conflict; but if the intention of both cannot be fully carried out, then there must be a necessary conflict, and one or the other must yield.

The provisions of both Acts relate to the validity of the same instruments as against the same parties. To make the instrument valid, the Act of Congress requires it to be recorded, while our statute requires actual possession to be taken of the property itself. The entire right of the party to the same de-
[371] scription of *property, depends, in the contemplation of each act, solely and exclusively upon that which it alone prescribes.

If, then, Congress intended to give a party certain perfect

rights, upon the performance of certain specified conditions, can the act of the Legislature require the party to do more without abridging his already perfected rights. And if these perfected rights are abridged by the statute, is it not substantially in conflict with the Act of Congress? The Act of Congress intended to accomplish a given end, by the use of specified means, and that end is defeated by the statute, when it requires other means to be used to attain the same end. The Act of Congress expressly makes the record of the instrument full notice as to third parties; while the statute says it is not such notice. And if we carry out the provisions of our statute, and give them full force, then the record of the instrument accomplishes nothing, and the provision of the Act of Congress is practically idle. It accomplishes no end, and a compliance with it gives the party no rights. As both Acts relate to the subject of notice to third parties, and as the provisions of each are different, and make the same rights of the party depend upon a compliance with these different provisions, the two are necessarily in conflict, and both cannot stand. And this case is not like the power to tax the same property, existing at the same time, in the State and Federal Government. Taxation, as existing in these different governments, is the right to take different portions for different purposes of the same divisible mass; and the taking of one portion, by one government, for one purpose, is not in conflict with the taking of another portion by the other, for a different purpose. If each had the right to take the whole, and each attempted to exercise this right in full, then there would be a necessary conflict, and the exclusive right in both could not exist. So, in this case, Congress and the Legislature have both assumed to declare all that shall constitute notice to third parties, and as they differ, there must, of necessity, be a conflict.

If, then, it be true, that there is a necessary conflict, which Act is paramount? And the solution of this question depends upon the construction of that clause of the Constitution of the United States, which gives Congress the power to regulate commerce.

In the great case of *Gibbons v. Ogden*, 9 Wheat., this clause received a most thorough examination. In that case, it was held, that the power to regulate commerce is general and exclusive, and no part of it can be exercised by a State. But when this power has not been exercised by Congress, but lies dormant, and a State, in the meantime, exercises such power over a given subject, the question, whether the action of the State be void in such a case, was left in doubt, as it did not necessarily arise. But in the subsequent cases of *Wilson v. The Black-bird Creek Marsh Company*, 2 Pet. 243, and *The City of New York v. Miln*, 11 Pet. 102, it was held that such action of a State, would be valid, until the dormant power of Congress should be exercised. From these authorities it would follow, that the statute of this State was valid, whether the power

rightfully belongs to Congress or not, until the passage of the Act of July, 1850, In all these cases, it was held that, when Congress acts, the statute of the State must yield, where the two conflict. "In every such case," says the Chief Justice MARSHALL, "the Act of Congress or the treaty is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it."

The only remaining inquiry arising under the first question is, whether this provision of the Act of Congress, is within the power to regulate commerce. This power to regulate is the power "to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself; may be exercised to its utmost extent, and acknowledges no limitations, other than those prescribed in the Constitution." (9 Wheat. 196.)

The power of Congress to regulate commerce being general and exclusive, when exercised, it becomes important to know what commerce is, and what means may be used by Congress to attain the ends contemplated. When power to attain a certain end is given, and no restriction, express or implied, is imposed, the choice of the means necessary and appropriate to the end, must rest with the agent upon whom the power is conferred; and the right to use such means is of course implied. And in this case it is conceived, the inquiry regards the fact whether the right to regulate the evidence of title to the vehicle of commerce, is a necessary means to carry out effectually in practice the power to regulate commerce itself. If it be a means substantial and immediate, and not contingent and remote, it would seem clear that Congress had the right to pass the Act in question.

"Commerce," says Chief Justice MARSHALL, "undoubtedly is traffic, but it is something more; it is intercourse. It is the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribed rules for carrying on that intercourse." (9 Wheat. 189.) "Commerce," says Mr. Justice JOHNSON, "in its simplest signification, means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, and various mediums of exchange, become commodities, and enter into commerce; the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulation. Ship-building, the carrying trade, and propagation of seamen, are such vital agents of commercial prosperity, that the nation which could not legislate *over these subjects, would not possess power to regulate commerce." (9 Wheat. 230.) And the same learned Judge held, that the power conferred upon Congress to regulate commerce, "was not that power to regulate commerce which previously existed in the States." It was admitted by all counsel in that case, that "unaffected by a state of war, by treaties, or by municipal regulations, all commerce among independent States was legitimate."

In the same case, Justice JOHNSON uses this forcible and clear language:

"The power of a sovereign State over commerce, therefore, amounts to nothing more than a power to limit and restrain it at pleasure. And since the power to prescribe the limits to its freedom, necessarily implies the power to determine what shall remain unrestrained, it follows that the power must be exclusive—it can reside but in one potentate."

The rights of migration and of commerce are founded upon natural law, and they cannot be rightfully restrained, except when such restraint is necessary for the good of society. Men have the right to buy and sell, export and import, all commodities they please, unless restrained by some positive law. And as to the question when, how far, and in what manner they should be restrained, the law-making power must determine.

The legislation of Congress, under this grant of power to regulate commerce, has uniformly proceeded upon the idea that the vehicles of commerce were but agents of trade, and the right to regulate them was included in the right to regulate the end for which they were used. Acts have been passed in reference to the enrollment and licensing of vessels engaged in commerce, either with foreign nations, or among the States. The power of Congress to regulate commerce is just as great in the one case as in the other, for the reason that the Constitution confers it equally in both cases, without restriction.

If, then, Congress can pass laws regulating the contracts of seamen, the form, capacity, and size of vessels, the number of passengers in proportion to tonnage, and other matters concerning these vehicles of trade, could not Congress equally regulate the manner in which a sale or a mortgage should be made and recorded. If Congress has the right in one case, it is difficult to say the right does not exist in the other. The only plain and intelligible rule would seem to be, that the power of Congress to regulate commerce extends to all the immediate agents and vehicles of commerce; and as it extends to these vehicles for some purposes, it must for all. The power to prescribe the manner in which these vehicles may be sold or mortgaged, may, in its exercise vitally affect commerce itself. If the power of selling or mortgaging these vehicles of commerce, be improperly restrained, commerce itself must be immediately affected. The *provisions of the seventeenth and eighteenth sec- [374] tions of our statute, afford a good illustration.

To require the mortgagee, in all cases, to take possession of the vessel is a harsh provision, and must operate greatly in restraint of commerce. How the master of a vessel, who is a part owner, could execute a mortgage, and still remain on board, under the stringent provisions of our statute, it is difficult to see. By requiring every one who lends money to a vessel to take and keep possession of the property, the right and opportunity to raise means are greatly abridged. Few persons would be willing to aid a vessel on such terms. The provisions of the Act of

Congress are far more reasonable and beneficial, and equally just and safe for all parties concerned. The record system is as applicable to vessels navigating the ocean, as to lands situated within the limits of a State.

It must be conceded that commerce with foreign nations and among the States, requires uniform and fixed laws and usages. Persons engaged in this pursuit learn law from experience and information. There is therefore, a fitness, and even necessity in giving this power to Congress.

"If there was any one object riding over every other in the adoption of the Constitution," says Mr. Justice JOHNSON, "it was to keep the commercial intercourse among the States free from all invidious and partial restraints." (9 Wheat. 231.)

The Act of Congress has established a uniform, plain, practical and secure rule, for the sale and mortgage of vessels; and this regulation leaves the owners of these vehicles of commerce, and all persons dealing with them, the means of protection without injury to either party. But if these vessels are still subject to the laws of the different States, after Congress has legislated upon the subject, then there can be no certain and uniform rule. From the rapid extension and increasing importance of our commerce, these provisions of the Act of Congress become indispensable.

Another very strong reason to support this provision of the Act of Congress, is to be found in the fact, that the federal government can only protect the rights of vessels navigating the ocean.

Mr. Webster, in his letter to Lord Ashburton, with reference to the case of the "Creole," laid down the doctrine substantially, that the vessels of a nation are considered as parts of its territory, and that her jurisdiction and laws accompanying her ships, not only over the high seas, but into ports and harbors, or wherever else they may be water-borne. (Cited in Flanders on Maritime Law, Sec. 54, note 1.)

Vessels completely engaged in the internal commerce of a State, and that never go beyond its limits, are admitted to be within the exclusive jurisdiction of the State. (9 Wheat. [375] 194.) *But vessels engaged in commerce with foreign nations, or among the several States, constitute a peculiar class of property, and the jurisdiction of the national government accompanies them wherever they may go. Under our peculiar system the federal government can only negotiate with foreign nations, and can only be responsible to them for injuries to their commerce. It is therefore necessary that Congress should have entire power over all vehicles of commerce in such cases.

If these views be correct, the record of the mortgage was sufficient notice to the defendant Lawrence. But conceding, for the sake of argument solely, that they are not, we will proceed to consider the second question.

In reference to conveyances of real estate and the sale of per-

sonal property, the contract in both cases is valid as between the parties, without a record in the first, or a change of possession in the second instance. But in regard to third parties, to make the contract good as against them, the deed must be recorded in the one case, and the possession of the personal property changed in the other. The object contemplated by the law in both cases, is the protection of others against fraud. This is accomplished by giving notice of the deed or sale; and this notice is given in one case by the record, and in the other by a change of possession.

In reference to conveyances of land, as the object of recording the deed is to give notice to subsequent purchasers, it has always been held that although the deed was not in fact recorded, yet if the subsequent purchaser took with actual notice, he was not injured, and the first deed must stand. As the end contemplated by the law had been attained, the intent of the law had been fulfilled, and the protection designed by it accomplished. The recording statute only protects the subsequent purchaser in good faith.

It would seem that the same rule must apply to the sale of personal property, where the seller retains possession, and the subsequent purchaser takes with actual notice. The fifteenth section of our Statute of Frauds only makes the sale of personal property without a change of possession, "conclusive evidence of fraud as against subsequent purchasers in good faith." To make such a sale void as against a subsequent purchaser, he must purchase in the same "good faith," as a subsequent purchaser of real estate. If, therefore, he has actual notice, he cannot be a purchaser in good faith in the one case any more than in the other. The language of the statute is the same in both cases, and must receive the same construction. And the reason and justice of the rule are the same in both cases.

In reference to mortgages of personal property, the language of the seventeenth section of our Statute of Frauds, is in a different form, and does not contain the expression "subsequent *purchaser in good faith." It will be perceived [376] that it is positive, and without condition or qualification, that "no mortgage shall be valid against any other person than the parties thereto, unless the mortgaged property be delivered to and retained by the mortgagee."

If this provision stood alone, without any connection with other provisions in the same Act, it would show an intention on the part of the Legislature to make a distinction between the case of a sale and a mortgage of personal property. And if we give this seventeenth section a literal construction, a change of possession in the case of a mortgage of personal property would be indispensable to the validity of the mortgage as against third parties. But it would seem from the scope and purpose of the Statute of Frauds, as well as of the statute concerning conveyances, that this could not have been the intention of the Legislature. There is no good reason, it is conceived, why a subse-

quent purchaser of real or personal estate, with notice, should not be permitted to defeat the prior sale, and yet a subsequent mortgagee be allowed to do so. The mortgagee has certainly no greater claim than the purchaser. The law should protect, or defeat, both alike. They are both equally innocent without notice, and equally guilty with it. And, in both cases, the man who takes with actual notice, and therefore, with the deliberate intent to defraud others, should never be sustained in a Court of Justice. The object of the law in all cases is the protection of the innocent, and not the reward of the guilty. He who takes a second conveyance or mortgage with actual notice of the first, deliberately aids and abets the fraudulent grantor or mortgagor in the attempted commission of a fraud, and should justly suffer the consequences.

In this case the proof of notice was sufficient, and the finding of the Court below correct. For these reasons, I think the judgment of the Court below should be affirmed.

MANLOVE v. WHITE.

STATUTE—EFFECT OF REPEALING ACT.—Where a general repealing statute is passed, and on the next day a supplementary Act is passed, excepting certain counties from the operation of the repeal, to a certain extent: *Held*, that the case was a special one, and there being no doubt of the true intention of the Legislature, the supplementary act must be regarded as a part of the repealing Act, and must be given the same effect as if passed on the same day.

IDEM.—So held, in the construction of the Act of April 29th, 1857, repealing the then existing law concerning ex-sheriffs, as tax-collectors, and requiring them to turn over the assessment-rolls to their successors, taken in connection with the Act of April 30th, excepting certain counties from the operation of the repealing law of the day previous.

APPEAL from the District Court of the Sixth Judicial District.

[377] *The plaintiff filed his petition, setting forth that he was elected sheriff of Sacramento county, at the general election, 1857, and having duly qualified, he entered upon the discharge of the duties of the office, October 5th, 1857, and claiming that, as such sheriff, he is by law entitled to the collection of the taxes levied in the county, but that the defendant, the late sheriff of the county, refuses to deliver to the plaintiff the assessment-roll. The petition prays for a *mandamus*, to compel the defendant to deliver to plaintiff the assessment-roll. The defendant demurred to the petition. The demurrer was sustained, and the plaintiff's petition dismissed.

Plaintiff appealed.

Latham & Sunderland, for Appellant.

D. W. Perley, for Respondent.

BURNETT, J., delivered the opinion of the Court—FIELD, J. concurring.

The plaintiff, who is the newly elected sheriff of Sacramento county, filed his petition in the Sixth District Court, praying for a *mandamus*, to compel the defendant, the former sheriff of said county, to deliver over to the plaintiff the assessment-roll of the said county, for the year 1857. The defendant demurred to the petition, which was sustained, and the plaintiff appealed to this Court.

There is no dispute about the facts, and the only question for this Court is simply one of construction of certain statutes. By the provisions of the thirty-ninth section of the Act of 29th April, 1851, concerning sheriffs, it was provided that the former sheriff should complete the execution of all final process, which he had begun to execute; and by the explanatory Act of May 18, 1853, the collection of taxes was construed to be unfinished business. (Com. L. 718, 737.)

By the thirty-third section of the Act of April 29th, 1857, the old sheriff is required to turn over the assessment-roll to the new sheriff, who shall complete the collections; and by the fifty-fifth section of the same Act, certain specified sections of former Acts are expressly repealed, and then a clause added at the close of the section, repealing, in general terms, "all other Acts, so far as the same conflict with the provisions of this Act." On the 30th April, 1857, one day after the passage of this Act, a supplementary Act was passed, providing that the thirty-third section should not apply to the sheriffs of certain counties mentioned, and including the sheriff of Sacramento, so far as the present incumbents were concerned. (Statutes of 1857, 336, 344, 357.)

The learned counsel for appellant contends that the fifty-fifth section of the Act of 29th April, 1857, repealed the thirty-ninth section of the Act of 29th April, 1851, and [378] that the supplementary Act of April 30th, 1857, did not revive it, and could not do so, under the provisions of the Act of March 14th, 1853, which provides that the repeal of a repealing Act does not revive the Act repealed, without express words. (Com. L. 214.)

There is certainly a great deal of force in the position of counsel. The language of the Act in regard to repealing statutes is certainly very strong and explicit, that the repealed Act can only be revived by express words.

But if we take the construction contended for as correct, for the sake of the argument, the legitimate result would be this: that neither the old or the new sheriff would be authorized to collect the unpaid taxes. For it is clear that the supplemental Act must, under any construction, modify the Act of April 29th, 1857; and, therefore, the former sheriff would not be compelled to deliver over the assessment-roll to the new sheriff, and the latter would have no means, and no authority to make the collections.

The intention of the Legislature, in passing the supplementary Act of April 30, 1857, is too clear to admit of any doubt. The reason that induced the passage of this supplementary Act would seem to be the fact, that the then present incumbents were elected with the thirty-ninth section of the Act of 1851 in force, and looked to the completion of the collections as a part of their duties. It was considered by the Legislature in the nature of a contract, binding in good conscience upon the State.

The case is a special one, and, under the circumstances, there being no doubt as to the true intention of the Legislature, the supplemental Act must be regarded as a part of the Act of April 29th, 1857, and must be given the same effect, as if passed on the same day.

Judgment affirmed.

UPHAM v. SUPERVISORS OF SUTTER COUNTY.

COUNTY SEAT, CHANGE OF.—The legislature can delegate the power to the voters of a county, to select a county seat therein.

LEGISLATURE CANNOT DELEGATE ITS POWERS.—The Legislature cannot delegate its general legislative powers, but it can authorize others to do those things which it cannot understandingly or advantageously do itself.

IDEM.—Admitting that the Legislature must directly select the places for holding the District Court, it does not follow that the right to select a county seat may not be conferred by law upon the people, as the Constitution does not require that the District Court shall be held at a county seat.

APPEAL from the District Court of the Tenth Judicial District, County of Sutter.

[379] *The plaintiff, a citizen and tax-payer of Sutter County, filed his bill, praying for an injunction restraining the supervisors from erecting buildings for county purposes in Yuba city, to which place the county seat had been ordered to be moved from Nicolaus, by a vote of the citizens of the county, at an election upon the question of the removal of the county seat, under the provisions of the Act of 1856, conferring the necessary authority therefor.

The only question raised in this case, is the constitutionality of the Act. The Court below entered judgment, dissolving a temporary injunction, granted on the commencement of this suit, and dismissing the bill. Plaintiff appealed.

Long & Morrison, for Appellant.

The only question presented by the record in the case, is the constitutionality of the Act for the location of the county seat of Sutter county. (Laws of 1856, p. 142.)

Section one of said Act provides as follows:

“An election shall be held in the county of Sutter on the 15th day of May, 1856, to determine and locate the county seat of said county.”

Section five provides that "after the returns shall have been made and canvassed, any one point or place having a number of votes equal to a majority of all the votes cast, shall be declared the county seat of said county," etc.

Section four, article eleven, of the Constitution of this State, reads as follows:

"The Legislature shall establish a system of county and town governments, which shall be as nearly uniform as possible throughout the State."

Section ten, article six, of the Constitution, reads as follows:

"The times and places of holding the terms of the Supreme Court and the general and special terms of the District Courts within the several districts, shall be provided for by law."

Now, we submit, in the first place, that the Constitution is imperative on the Legislature to fix the times and places of holding the District Courts within the several counties, and in pursuance of this provision of the Constitution, the act of this State requires every such Court to sit at the county seat. (Passed May 19, 1853. Comp. Laws, p. 754, Sec. 94.)

The eleventh article, section fourth, of the Constitution, already cited, requires the Legislature to establish a system of county governments, and the chief and principal thing necessary in a county government is a county seat, and in pursuance of the requisitions of the Constitution the Legislature, by an act in 1851, fixed the county seat of Sutter at Nicolaus—where, we contend, it must remain until it is removed by direct enactment of the Legislature. Can the Legislature do that indirectly which *it is compelled to do directly. In other [380] words, can the Legislature delegate its power to the vote of the people, or to any other tribunal? Certainly, if we are right in our construction of the Constitution, the Legislature has the only power to fix the county seat; and the act submitting the matter to a vote of the people of the county, is void; and therefore the erection by the defendants of the court-house and other public buildings at any other place than the county seat, to wit: the town of Nicolaus, is illegal; and they ought to have been enjoined from so doing. This same question has already been decided by this Court in the case of *Dickey v. Hurlburt*, 5 Cal. 343.

Whether we were right in our construction of the Constitution or not, as to the right of the Legislature to delegate the power to fix the county seats to any other tribunal, we are certainly right in contending that its act doing so in this case is void, because this Court has so decided in the case of *Dickey v. Hurlburt*, and whether that decision is correct or not it is the law of this case and must govern it; therefore we contend—

1. That the Act of the Legislature of 1851, established the county seat of Sutter at Nicolaus.

2. That Nicolaus is the legally established county seat of Sutter.

3. That no power can remove it from Nicolaus, but an Act of

the Legislature, and that the Legislature cannot delegate that to others to do which it is bound to do itself.

4. And therefore that the Act of the Legislature submitting the removal of the county seat of Sutter to the vote of the people, is unconstitutional and void.

5. That the defendants have no right to cause the erection of public buildings for said county at any other place than the legally established county seat; and, therefore, that the injunction ought to have been sustained, and that the Court erred in dissolving it.

McDougall and Field, for Respondents.

The Act submits the location to the vote of the people of the county, and it is urged that it is not within the constitutional power of the Legislature to make such submission.

This mode of locating county seats has obtained in all of the Western States, and has been adopted in this State, in numerous instances.

Its propriety was unquestioned, until the opinion expressed by Justice HEYDENFELDT in *Dickey v. Hurlburt*, 5 Cal. 344.

This opinion was not necessary to the determination of that case, and the conclusion was placed on different grounds by the Chief Justice, in his opinion.

It is assumed that this expression of opinion was based upon the provision of article sixth, section ten, of our Constitution. *"[381] The times and places of holding the terms of the Supreme Court, and the general and special terms of the District Courts, within the several districts shall be provided for by law."

To test this question directly, suppose there was no such provision in the Constitution, would it not be the duty of the Legislature to provide by law for the times and places of holding the District Courts? Is the obligation, duty, or authority of the Legislature changed by this directory (and not inhibitory,) provision?

If the construction is a sound one, that the Legislature, by direct act, must fix the "places," then they must fix the "times" also. It will then follow, that a Judge cannot appoint a general term, or hold a special term; that no Court could be held, except it commenced on the day expressly fixed by legislative enactment. This would be a new and startling proposition, and if it could be maintained, would avoid a large number of the judicial determinations of our Courts.

So, if the Constitution requires the place to be fixed by express enactment, the proceedings of a Court held at a different place, would be absolutely void. The inconvenience of such a construction is a sufficient answer to it.

Contemporaneous legislative exposition is another sufficient answer, but neither of these answers are required, as the construction is against the plain language of the Constitution. Time and place "shall be provided for by law."

Has not a place been provided for by the act in question. To provide for, does not necessarily include the act of direct selection, and consequently does not necessarily require a direct selection; so that the Legislature provides for the selection, its duty is discharged.

If the Legislature is not prohibited by express terms, or necessary implication, from providing for the place of holding Courts, through an expression of the people of the district, the Legislature may thus provide.

The Legislature is not prohibited by express terms, or by necessary implication, and the conclusion follows.

It may be said, that the location of seats of justice, is a part of legislation, and as a legislative power, cannot be thus delegated. It may not be regarded as necessary to discuss this proposition, but as it may be presented and urged by the adverse counsel, we submit the following authority, which also bears upon the point already considered: In the *People v. Reynolds*, 5 Gilman, 1, the question was made, whether an act providing for the division of an old, and the organization of a new county, to take effect upon its approval by a popular vote, was constitutional. The case was very elaborately argued.

In conclusion, it is insisted—

1. The Constitution does not prohibit the Legislature from thus providing for the place of holding the Courts, [382] and therefore the Legislature may thus provide.

2. The fair construction of the Constitution authorizes the Legislature so to provide.

3. There is no reason to suppose or infer that the framers of the Constitution intended to deny this power to the Legislature.

4. The power is in the Legislature according to contemporaneous construction.

5. The power exercised is a convenient one, as a matter of general legislative expediency.

6. The rule contended for by the adverse party, would not only be inconvenient, but infinitely mischievous in its consequences.

TERRY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

The only question presented by the record in this case is the constitutionality of the Act of 1856, to provide for the location of the county seat of Sutter county.

The Act authorizes the question to be submitted to the voters of the county, and provides that any place, receiving a majority of all the votes cast, should be declared the county seat.

The appellant contends that under the provisions of the tenth section of article six of the Constitution, which directs that "the times and places of holding the terms of the Supreme Court, and the general and special terms of the District Courts, within the several districts, shall be provided for by law;" the Legislature must directly select the places of holding the terms

of the District Courts, and the authority to do so cannot be delegated.

Admitting this construction to be correct, it does not necessarily follow that the right to locate county seats may not be conferred upon the people of the different counties; the Constitution does not require the terms of the District Courts to be held at the county seats, and we think it would be competent for the Legislature to fix upon other places for that purpose.

But we are not able to perceive any conflict between the Constitution and the act in question; we think that the places of holding Courts are "provided for by law." When it is enacted that the terms shall be held at the county seats of the different counties, providing for a place does not necessarily include its direct selection: if the mode of selection is prescribed by law, then the place is provided for. By the Constitution the Legislature is required to provide for many objects which cannot be effected by the direct action of the Legislature, and while the maxim *delegatus non potest delegare*, is undoubtedly true, the extent of its application to legislative bodies must depend upon the nature and design of the legislation and the means neces-

sary to accomplish the design, as well as a knowledge of [383] the powers *of the Legislature and the acts which may be done in the exercise of those powers. A question similar to the one under consideration arose in the case of the *People v. Reynolds*, 5 Gil, 1. The Court said:

"In determining what is legitimate and proper legislation, we feel warranted in looking at the past to see what kind of laws legislative bodies have been in the habit of passing. If we take the action of all past legislators in determining what may and should properly be done in the exercise of legislative powers, we see that while they are bound to make the laws, yet those laws need not be absolute, nor make every provision for doing that which they may authorize to be done; while all must be done under their sanction, yet they need not do all, nor command all. A law may depend upon a future event, or contingency, for its taking effect; and that contingency may arise from the voluntary act of others. Of this class are all laws creating private corporations, and a very large proportion of the laws creating public, or municipal corporations. The former must necessarily be submitted to the corporators for acceptance before they take effect; and this has been very usually done with the latter, especially in the incorporation of towns and cities, and not unfrequently of counties; and we have never heard it questioned before, that the Legislature might properly submit a law, creating either a private or a public corporation, to the acceptance of the corporators. All such laws are perfect and complete when they leave the hands of the Legislature, although a future event shall determine whether they can take effect or not. If we say that this is an unauthorized delegation of legislative power, we forget what is a proper and legitimate exercise of that power. If the saying be true, that the Legislature can-

not delegate its powers, it is only so in its most general sense. We may well admit that the Legislature cannot delegate its general Legislative authority; still it may authorize many things to be done by others which it might properly do itself. All power possessed by the Legislature is delegated to it by the people, and yet few will be found to insist that whatever the Legislature may do, it shall do, or else it shall go undone. To establish such a principle in a large State, would be almost to destroy the government. The Legislature may grant ferry-licenses, or it may lay out roads and specify their metes and bounds, and yet, who will doubt that it may delegate this power to others, either by general or special laws? So, also, it may pass all the laws requisite for the government of a particular city, or township, or school district, and who will doubt the propriety of its authorizing this to be done by the people within the limits of the city, town, or district, by their local representatives, or even directly? This is making laws, and laws, too, of as binding efficacy as if passed directly by the Legislature. They are de-*pendent upon the Legislature for [384] their vitality and force, through the act of incorporation, or law, under and by virtue of which they are made. Necessarily regarding many things, especially affecting local or individual interests, the Legislature may act either mediately or immediately. We see, then, that while the Legislature may not divest itself of its proper functions, or delegate its general legislative authority it may still authorize others to do those things which it might properly, yet cannot understandingly, or advantageously, do itself. Without this power, legislation would become oppressive, and yet imbecile. Local laws almost universally call into action, to a greater or less extent, the agency and discretion, either of the people or individuals, to accomplish in detail what is authorized, or required, in general terms. The object to be accomplished, or the thing permitted, may be specified, and the rest left to the agency of others, with better opportunities of accomplishing the object, or doing the thing understandingly."

The reasoning of this opinion is, we think, conclusive on the questions here presented. The case of *Dickey v. Hurlburt*, relied on by appellant, is not in point. The question in that case was, whether a judicial officer could exercise functions properly belonging to another department of the government.

Judgment affirmed.

PALMER v. BOLING.

¹-TAXATION—ASSESSMENT, SUFFICIENCY OF.—Where a claim to a tract of land under a Mexican grant, somewhere within a certain larger tract, was ascertained, and the land segregated by a survey, under a decree of confirmation by the U. S. Supreme Court: *Held*, that the land became imme-

1. Approved, *Patten v. Green*, 13 Cal. 323; *Higley v. Shoemaker*, 22 Cal. 372; *People v. Crockett*, 33 Cal. 137. Distinguished, *Bucknall v. Story*, 36 Cal. 73.

diately taxable, and that an assessment thereof will be presumed to have been made after the Survey, where the time allowed by law for the assessment extended to a day four days after the survey.

IDEM.—PRESUMPTIONS OF REGULARITY.—The acts of the officer making the assessment must be presumed to be in conformity with law, until the contrary is shown.

APPEAL from the District Court of the Thirteenth Judicial District, County of Mariposa.

This was a proceeding to enjoin the tax-collector of Mariposa from selling, for taxes, a tract of ten leagues of land, known as the Fremont Grant.

The facts, as averred in the bill, are briefly these:

The grant having been confirmed, giving to the claimant ten leagues of land, to be located within certain boundaries, a survey was made accordingly, and the ten leagues segregated. The survey was completed and approved, July 31, 1855, four days before the expiration of the time allowed by law for the completion of the annual assessment, for State and county [385] taxation. The assessor made his return within the time allowed by law, including a general assessment on the ten leagues of land claimed by Fremont, placing the value thereof at five hundred thousand dollars. The plaintiff avers himself to be the present owner of the land. In the Court below a demurrer was filed to the petition, which was sustained by the Court, and the bill dismissed. Plaintiff appealed.

The case comes at this term, before this Court, on a rehearing.

Robinson, Beatty & Botts, for Appellants.

The bill alleges, and the demurrer admits, that Fremont's claim was finally adjudicated on the 27th day of June, 1855, confirming to Fremont his title to ten leagues, generally within the hundred leagues described in the grant, and directing the Surveyor-General to survey and locate the claim within the limits described in the grant. This was done upon the 31st day of July, 1855. This was the first act of segregation. Before that day, Fremont was the owner of no particular foot of land in California. On that same day, the power of the assessor for the county of Mariposa ceased. The statute provides that, between the first Mondays of March and August of each year, the assessor shall assess all the real estate in his county, and although he has after-power to supply omissions, he has no authority to assess land that was not assessable on the 31st day of July. At any rate, it is admitted that this pretended assessment was made between March and August.

What is an assessment? It is an estimate of value made by an officer sworn to exercise his judgment, fairly and impartially. To value a tract of land, it is not too much to say that two things must be known, the quantity and the quality. If, before the 1st day of August, the Mariposa assessor knew the quantity of Fremont's tract, he certainly could not know the

quality, because, up to that day, it lay anywhere within a varied tract of one hundred leagues, one portion of it a barren waste not worth a cent an acre, another abounding in the richest ore.

The record discloses the fact that the sum of five hundred thousand dollars was assessed generally against the ten leagues of land claimed by Fremont, and not against the said ten leagues of land surveyed and located by the Surveyor-General on the 31st day of July, 1855. And yet is the land so surveyed and located that the sheriff threatens to sell? In other words, it is admitted that the sheriff is advertising a tax-sale of land that has never been assessed. Now, it is only by assessment that he obtains the right to sell. The recorded estimate of the assessor operates as a judgment in favor of the State against the owner, and constitutes a lien upon the land assessed, (Sec. 42 of the Revenue Act,) and the sheriff is then authorized to sell the land upon which the lien has attached, to pay the judgment in favor of the State. Without an assessment there can be [386] no judgment, without a judgment there can be no lien, and without a lien there can be no sale.

It appears, in short, that whilst Fremont had nothing but an equitable right to have ten leagues of land within certain limits, located and set apart to him by the United States, the county assessor of Mariposa undertook to guess what the claim would probably be worth after it should be located. But a claim to land, as distinct from the land itself, cannot form the subject of taxation—otherwise, where there are several claimants, it would be the duty of the assessor to estimate their relative chances of success, and then each assessment would constitute a lien upon the land, which would be absurd.

It was to illustrate the impossibility of assessing or taxing such a claim as this, that we cited the case of *Ballance v. Forsyth*, 13 Howard. In that case, the Court say, "although the right of Bourbonne to lot sixty-five was recognized by the government, yet until the public surveyor marked the lines, its position and extent could not be ascertained. The patent was not issued until 1845, two years after the tax was assessed, and it is not perceived how the specific lot could be taxed, when its boundaries were not known." The county assessor of Mariposa, it seems, has discovered a method of doing that which appeared impossible to the Supreme Court of the United States. Verily, this is a progressive age!

Wade & Fower, for Respondents.

In the case of *Ballance v. Forsyth*, the lot claimed by defendant, under the tax-title was not assessed for taxes due on it, but was sold to satisfy the assessment on a fractional quarter-section of land, held by defendant under the general laws for the entry and sale of public lands. This particular lot was within the limits of defendant's claim, but had previously been granted to the plaintiff under the Acts of Congress of 1820 and 1823, for the benefit of settlers in Peoria. "It seems (page 24) to have

been included in the south-east fractional quarter-section, but it was not taxable as a part of that tract." Again, objection was found to the tax-title, because it did not describe with any accuracy the portion of the tract that was sold for the assessment. (P. 23.) While it is unnecessary, and often impossible to give a particular description of the lands assessed, it is only necessary that the portion sold for the assessment should be described with certainty.

In *Carroll v. Perry*, 4 McLean, 27, the Court say: "The taxing power of a State may reach everything within a State, which can be denominated property. It may be made to embrace all equitable credits, of whatever description they may be." [387] The Court in that case refused to enjoin a sale *for taxes, the ground of the application being that a patent had not issued, at the time of the assessment, and therefore the land was not at that time subject to taxation.

It does not appear from the bill, that the assessment was not against a tract of ten leagues, the location and boundaries of which were known and fixed without the formalities of a "final survey" by the United States Surveyor-General.

The assessor is allowed until "the first Monday in August," (see Rev. Act, C. L. 692,) to make his assessment, and "he shall make also subsequent assessment, whenever he has reason to believe that property liable to taxation, has not been previously assessed." The "final survey" was approved by the Surveyor-General on the 31st of July, 1855, having been previously made. The assessment may have been made after the survey, and before "the first Monday in August," or "subsequently," as the law provides. Or, if made before, the survey operated to correct all defects in the description, in the assessment, and to identify it with this particular tract, according to its metes and bounds.

The Supreme Court of the United States in *Fremont v. United States*, 17 How. 542, declared that appellant's grant to these ten leagues "owned and claimed" by them, was, at its date, 1844, a title "not merely inchoate or equitable, but a legal title, which conveyed a present and immediate interest in fee to the grantee." We respectfully submit that the appellants being the owners of this property, and entitled to its revenues for years back, cannot avoid or be exempted from the payment of the taxes sought to be enforced against it, for their proportion of the expenses of government whose protection and benefits they have enjoyed.

On first hearing of this case, at the October Term, 1856, MURRAY, C. J., delivered the opinion of the Court—HEYDENFELDT, J., and TERRY, J., concurring.

This was a bill in equity, to restrain the defendant from selling certain lands in Mariposa county, for non-payment of taxes. The bill alleges two errors in the assessment; first—that the survey was made, and the patent issued to the grantor after the

assessment; and, second—that the land as assessed as “ten square leagues,” and not by any specific boundaries.

In support of the first proposition, the case of *Ballance v. Forsyth*, 13 How. 18, is relied on. An examination of that authority, will show it has no application to the present case, because, by the act of Congress, admitting Illinois into the Union, it was specially provided, that lands sold by the United States, should not be liable to taxation until five years after the sale thereof, or after the issuing of the patent.

Without inquiring how far such an act would be constitutional, *it may be generally stated, that no such act [388] has been passed with reference to California, and that all “lands lying within this State, owned or claimed by any person or corporation, whether patented or not,” are made liable to taxation by the statute of this State.

The second error is untenable. The statute requires, that the assessment shall contain a list of the real estate, “giving the quantity of acres in each tract, as near as may be possible, except in case of city or town lots, which may be described by reference to numbers and streets.”

To require a particular description of rural lands, would be imposing an unnecessary burden on the officer.

• Before closing this opinion, we would observe, inasmuch as a question of remedy was made, that since the decision of *De Witt v. Hays*, 2 Cal. 463, the Legislature have so amended the law as to make a tax-deed *prima facie* evidence of what it contains; so that it is not necessary, as it formerly was, to introduce evidence of the regularity of the assessment, and all the proceedings under it, and we are of opinion that this has changed the rule in reference to the right of a party to invoke the aid of a Court of Chancery, in a case where his property is about to be illegally sold for taxes, for, as the deed is *prima facie* evidence of title, and the error is in the assessment, the defendant would be driven to extraneous facts to show its illegality. There being no error patent upon the face of the proceeding, the deed being the only evidence necessary, would operate a cloud upon the title.

In *Robinson v. Gaar*, 6 Cal. 273, this point was not called to the attention of the Court, and the case went off on the decision of *DeWitt v. Hays*.

Judgment affirmed.

On the rehearing at this term, TERRY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

This was a proceeding to enjoin the sale of ten leagues of land, in Mariposa county, known as the Fremont grant.

This grant was, in the year 1855, listed for taxes by the assessor of said county, and its value assessed at five hundred thousand dollars.

By law, assessments were required to be made, and it is admitted this assessment was made between the first Monday of

March and the first Monday of August, 1855. It is also admitted that the final judgment, confirming Fremont's grant, was rendered on the 27th day of June, 1855; that, pursuant to said judgment, a segregation of the land from the public domain was accomplished, by a survey, on the 31st of July, 1855, and that, in default of the payment of taxes assessed as above, the defendant, who was sheriff and *ex officio* tax-collector [389] *for said county, threatens to sell the land contained in the boundaries established by the survey.

The appellant insists: First, that prior to the 31st of July, 1855, plaintiff had only an equitable right to have the ten leagues of land, within certain limits, located and set apart to him by the United States, and that, until the segregation was actually made, he was not the owner of any specific body of land, subject to be assessed for taxes.

Second, that an assessment is an estimate of value, made by an officer sworn to exercise his judgment fairly, and to do this, it is necessary that he should know quantity and quality of the land, which, in this case, could not have been known to the officer before the survey, as the ten leagues were included in a much larger tract, one portion of which was worthless, and the other immensely valuable.

The first point contended for is in direct conflict with the decision of the Supreme Court of the United States, in the case of *Fremont v. United States*. It was then held that the grant under which plaintiff claims, conveyed not merely an inchoate, or equitable, but a legal title, which vested in the grantee a present immediate estate in fee. (17 How. 542.)

By our Revenue Law, all property within the State, of whatever description, owned by an individual or private corporation, is subject to taxation, and if plaintiff was the owner of land within the State, he cannot escape duties which such ownership imposes. But, if we admit the correctness of both points contended for, it does not necessarily follow that the assessment is illegal. The precise time at which it was made is not shown; it is, however, admitted to have been between the 1st Mondays of March and August. It is not denied that, immediately upon the segregation of the land from the public domain, the legal title vested in plaintiff, and the land was subject to taxation. This occurred on the 31st day of July, which was Tuesday. Excluding the day on which the survey was made, and the 5th day of August, (which was Sunday,) four days intervene between the survey and the first Monday of August, on any one of which an assessment could have been legally made, and, in the absence of any evidence to the contrary, we must presume that the officer properly performed his duty, and that the assessment was subsequent to the survey.

For these reasons, in addition to those contained in the opinion of the late Chief Justice, the judgment is affirmed, with costs.

*PEOPLE v. HURLEY.

[390]

¹ **INSTRUCTION, WHEN PROPERLY REFUSED.**—An instruction asked for is properly refused when there is no evidence on the question of fact embraced in it.

² **HOMICIDE, WHAT NOT SUFFICIENT JUSTIFICATION.**—On a trial for murder, weakness of mind, fear, and excitement, of the defendant, produced by the violence of the deceased, will not justify the homicide.

IDEM.—Nor is an assault and the infliction of great bodily harm upon the defendant by the deceased, a justification, unless it appear that it was necessary to take the life of the deceased to prevent such bodily harm.

IDEM.—The impression of the defendant at the time of the killing, that a great bodily harm was about to be inflicted upon him by the deceased, cannot be submitted to the jury as a justification, if they believe such an impression existed in the defendant's mind.

IDEM.—The impression must have been produced by circumstances sufficient to excite the fears of a reasonable person.

IDEM.—**WHAT SUFFICIENT JUSTIFICATION.**—If the attempt to inflict bodily injury be made with a deadly weapon, then the reasonable fear and actual belief would justify the killing; but when the attempt does not constitute felony, there must exist the absolute necessity of taking life to prevent the bodily harm, in order to excuse the killing.

INSTRUCTIONS, PRACTICE ON GIVEN AND REFUSING.—Where equivalent instructions are given and refused, the Court should place its refusal on the ground that equivalent instructions were given. Unless this is done in the presence of the jury, they may be misled by the refusal.

APPEAL from the District Court of the Fourteenth Judicial District, County of Sierra.

The defendant was indicted for the murder of one James Thompson, committed by shooting the latter with a pistol; defendant was convicted of murder in the second degree, and sentenced to ten years imprisonment; he now appeals to this Court, upon errors assigned in the refusal of the Court below, to give to the jury the instructions asked by him.

The first instruction was to the effect that if the prisoner drew his pistol with no intention of shooting, unless it became necessary, and that in the scuffle which ensued, the pistol went off accidentally, the jury must acquit. The other instructions asked are fully set forth in the opinion of the Court.

Wm. M. Stewart, for Appellant.

Wm. T. Wallace, Attorney-General, for the People.

BURNETT, J., delivered the opinion of the Court—**TERRY, C. J.**, concurring.

The defendant was convicted of murder in the second degree. Certain instructions were offered by the counsel of the defendant, and refused by the Court, and the defendant excepted.

The first instruction offered by the defendant was properly

1. Practice on refusal of instructions, cited, *People v. Ramirez*, 13 Cal. 173; *People v. Williams*, 17 Cal. 148.

2. See *People v. Butler*, post 435.

refused, as there was no testimony tending to show that the pistol was accidentally discharged.

The second instruction was in these words:

[391] "If the jury believe from the evidence, that the defendant, *through weakness of mind, and by fear and excitement, produced by the violence of deceased, did not know what the effect of his act, if fatal, would be, with reference to the crime of murder, they must find for defendant."

This instruction was properly refused upon two grounds:

1. There was no evidence upon which to predicate it.
2. The instruction itself is not good law.

The third instruction was this:

"If the jury believe from the evidence that the deceased made the first assault, and was continuing the same, and inflicting great bodily harm upon the person of the defendant, at the time the fatal shot was fired, they must find for defendant."

The Court refused this instruction, but gave one in lieu thereof, which contained the same language up to the word "fired," and then added, "and that it was necessary to take the life of the deceased to prevent such bodily harm," then the jury should find for the defendant.

The instruction, as given, was correct, and in accordance with the thirty-first section of the Act concerning crimes and punishments. (Wood's Dig. 332.)

The fourth and fifth instructions offered by defendant, were substantially the same. The fifth was in these words:

If the jury believe from the evidence that the defendant fired the fatal shot, under the impression that great bodily harm was about to be inflicted upon him by the deceased, they must find defendant not guilty.

This instruction was properly refused, because it makes the "impression" of the defendant the justification of the act, whether that impression was produced by circumstances sufficient to excite the fears of a reasonable person, or not. This was contrary to the thirtieth section of the Act. (Wood's Digest, 332.)

Besides, the thirtieth section applies only to the cases mentioned in section twenty-nine. A reasonable fear and actual belief, will excuse the party in those cases. But a reasonable fear and actual belief of great bodily harm, are not sufficient in all cases. The statute says the killing must be "absolutely necessary" to prevent it. The infliction of "great bodily harm" upon another, may, or may not, amount to a felony. So an attempt to inflict it, may, or may not, be a felony. If attempted with a deadly weapon, or with the intent to commit a felony, then the reasonable fear, and actual belief, would justify the killing. (Sec. 50.) But when the attempt to inflict "great bodily harm" does not constitute felony, there must exist the absolute necessity mentioned by the thirty-first section, to excuse the killing.

The sixth and seventh instructions offered by the defendant, contained sound law, but the Court gave the same in substance, *in its second instruction, and in language [392] equally clear. When the instructions given, and that refused, are in substance the same, the party is not injured. *Miles Davan and others v. Walker and others*, April, 1857.*

But in refusing such instruction, the Court should always place its refusal strictly upon the ground that equivalent instructions had been, or would be given. Unless this is done in the presence of the jury, they may be misled by the refusal.

We can find nothing in the record showing that the learned judge who refused the instruction, stated his reason for so doing. We think this was error.

Judgment reversed, and cause remanded

TUOLUMNE WATER CO. v. CHAPMAN ET AL.

¹ **PLEADINGS—SUFFICIENCY OF COMPLAINT FOR INJUNCTION.**—A complaint alleging that plaintiffs had, for a long time, conveyed water from a stream for mining purposes, by means of a ditch, and had thus acquired a prior right to the enjoyment and use of the water, and were in the peaceable possession thereof, when defendants wrongfully diverted the same, and deprived plaintiffs thereof, and were continuing so to do, is sufficient to maintain a prayer for an injunction.

IDEM.—DEMURRER, WHAT IT ADMITS.—A demurrer admits the facts as alleged in the complaint.

IDEM.—IMMATERIAL ALLEGATIONS.—The allegation in the complaint, that defendants wrongfully claim some pretended and fictitious right to the use of the water, does not prejudice the right of the plaintiffs to the injunction.

NUISANCE—DIVERSION OF WATER-COURSE.—The diversion of a water-course is a private nuisance.

¹ **IDEM.—EQUITABLE RELIEF.**—No equitable remedy can be had for a mere past diversion of a water-course; but when the injury is continuing, relief may appropriately be sought in equity.

INJUNCTION, WHEN ALLOWED.—There is no occasion that the plaintiff should first establish his title at law, before he can obtain the injunction, when the averment of his right in the complaint is admitted by demurrer.

APPEAL from the District Court of the Fifth Judicial District, County of Tuolumne.

It is alleged in the complaint that the plaintiff is an incorporated ditch company, and for several years past has conveyed water by means of a ditch from the Stanislaus River, into French Gulch, and down said gulch, for sale to others, to be used for mining purposes, and by that means had acquired a prior right to the enjoyment and use of the water; and that being so in the peaceable possession and use of the water flowing in said ditch and gulch, the defendants diverted the water from said gulch, and deprived the plaintiff from its use and enjoyment, and still continue to do so, and refuse to desist therefrom, and wrongfully

* Not reported.

1. Cited, *Kittel v. Pfeiffer*, 22 Cal. 491.

claim some pretended and fictitious right to the use of the water, to the great and manifest injury of the plaintiff. The prayer of the complaint is for a decree forbidding defendants from using or diverting the water for a temporary injunction, and upon the final hearing, that the injunction be made [393] perpetual. *To this complaint the defendants demurred, which being sustained by the Court below, the plaintiff appealed.

H. P. Barber, for Appellants.

The demurrer admits the facts, to wit: that the plaintiffs are rightfully entitled to the water-course and water, and that defendants have diverted, and still continue to divert, and refuse to desist from diverting said water, to the great and manifest injury of said plaintiffs, and a total deprivation of the water. (Mitford's Eq. Plead. 5 Am. Ed. p. 155.)

The diversion of water-courses is a private nuisance. (Willard's Eq. Ju. 392; Angell on Water-Courses, Sec. 388, p. 425.)

The prevention or restraining of such nuisances is a special branch of equity jurisprudence. (Angell, Secs. 444, 457.)

"To justify the interposition of the Court by injunction to restrain a nuisance, the plaintiff's title must be free from doubt. If his title be conceded, there is no occasion to have it established by a verdict at law. Where a plaintiff has been immemorially in the enjoyment of a stream of water flowing through his land, and is in the actual possession, equity will restrain the obstruction or diversion of the water or any important part of it to the injury of the plaintiff. The diversion or obstruction of a water-course is a private nuisance." (Willard's Eq. Ju. 392.)

"A private nuisance is an act done, unaccompanied by an act of trespass, which causes a substantial prejudice, corporeal or incorporeal, of the right of another: *e. g.* diverting a water-course so as to interrupt the right of another person, that it should run undisturbed to his meadow or his mill." The remedies, however, at law can, at the utmost, only abate, or afford compensation for an existing nuisance, but are ineffectual to restrain or prevent such as are threatened or in progress; and for this reason there is a jurisdiction in equity to enjoin, if the fact of nuisance is admitted, or established at law, whenever the nature of the injury is such that it cannot be adequately compensated in damages, or will occasion a constantly recurring grievance." (Adams' Eq. pp. 210, 211.)

"Cases of a nature allowing for the like remedial interposition of Courts of Equity are the obstruction of water-courses, the diversion of streams from mills, the back flowage on mills," etc. (2 Story's Eq. Ju. Sec. 927, p. 257; Id. Sec. 928.)

In *Gardner v. The Trustees of Newburgh*, (2 John. Ch. 164, a leading case on the diversion of water-courses,) Chancellor KENT says:

"The Court of Chancery has also a concurrent jurisdiction by

injunction equally clear and well established in cases of private nuisance. Without noticing nuisances arising from other causes, we have many cases of the application of equity powers on this very subject of diverting streams, (citing many cases.)

*These cases show the ancient and established jurisdiction [394] of this Court; and the foundation of that jurisdiction is the necessity of a preventive remedy, when great and immediate mischief, or material injury would arise to the comfort and useful enjoyment of property.

The same doctrine was reiterated in the case of the obstruction of a water-course, in *Van Bergen v. Van Bergen*, 2 Johns. Ch. 271; *Croton Turnpike Co. v. Ryder*, 1 J. C. 611; *Bergen v. Bergen*, 3 J. C. 182; *Varrick v. Mayor of New York*, 4 J. C. 53; *Reid v. Gifford*, 9 J. C. 439; *Corning v. Lowerre*, 6 J. C. 439; *Livingston v. Livingston*, 6 J. C. 497; *Hammond v. Fuller*, 1 Paige, 197; *Belknap v. Trimble*, 3 Paige, 577; *Mohawk Bridge Co. v. Utica and S. R. R. Co.*, 6 Paige, 555; *Reid v. Gifford*, 1 Hopk. Ch. 416; *Olmstead v. Loomis*, 6 Barb. 152; *Fisk v. Wilbur*, 7 Barb. 395; *Gilbert v. Mickle*, 4 Sand. Ch. 357; *Corning v. Troy Iron Works*, 6 How. Pr. 89.)

Let us now examine the decisions of the Supreme Court of this State:

In *Dewitt v. Hays*, 2 Cal. 463, the writ was denied because the party had a perfect remedy at law, and the Court had no power to interpose, and it was not a case of nuisance.

In *Minturn v. Hays*, 2 Cal. 590, the Court say: "The writ of injunction can only be issued when the bill makes out a case of equity jurisdiction."

"In the case under consideration the issue is strictly one at common law, and Courts of Equity can take no cognizance thereof."

In *Middleton v. Franklin*, 3 Cal. 238, it was held that the injury must be irremediable, or lead to irremediable mischief, (e. g., the destruction of a party's business, as alleged in our bill,) and that the bill in that case did not show a sufficient probability of mischief—at least "until the question of nuisance or not was determined by a jury." In the present case the nuisance is admitted, and therefore requires no such determination.

In *Waldron v. Joiner*, 5 Cal. 9, the Court merely hold that an injunction ought not to be granted in an action of trespass, unless it appears that the injury will be irreparable and cannot be compensated in damages. The Court also lay stress upon the fact that "no action has ever determined the plaintiff's rights."

In *Bucklew v. Estill*, 5 Cal. 20, the Court allowed an injunction to restrain the cutting down of trees, where the answer admitted the grant through which plaintiff claimed.

The only case closely resembling this is that of *Ramsey v. Chandler*, 3 Cal. 90, where defendants were guilty of a private nuisance, by raising a dam and overflowing plaintiff's

ground. A perpetual injunction was allowed, and defendants appealed.

[395] *The Court say the right is clearly with the plaintiff, and the decree was affirmed.

Defendants admit our right in the clearest manner—admit that they are guilty of a private nuisance,—that they are continuing it and refuse to desist—that they wrongfully claim a pretended and fictitious right to the water—and that these acts are to our great and manifest injury and the total deprivation of the use of the water,

This is not a question of dissolving an injunction, but whether, on demurrer, we are not entitled to the relief prayed. We waive any claim for damages, and pray that, on the facts stated in the bill, a decree may be made enjoining defendants from further diversion of the water.

The same question was presented to the Court in the case of *Mearis v. Bicknell*, just decided, (Jan. T. 1857,) in which the right to an equitable remedy appears to have been conceded.

Wolcott & Greenwood, for Respondents.

The main question raised by the demurrer, as fully appears from the record, is as follows: Is this a case in which the Court at Chambers, shall be permitted to exercise purely equitable jurisdiction, thereby leaving it wholly within the discretion of the Judge to determine the various conflicting rights between the parties litigant, as to the use, enjoyment and possession of water, as well as the disputed question of diversion of the same. Also, to require a jury to pass upon and determine such rights on issues specially framed by the Court, or otherwise, or to entirely dispense with a jury, provided such jurisdiction be granted, thereby leaving it within the power of the Judge (sitting as Chancellor,) to enter a decree in direct opposition to any verdict that might be rendered by a jury. (See *Gray v. Eaton et al.*, Oct. T. 1855.)

It is strongly argued, by counsel for plaintiffs, that the demurrer of defendants admits every allegation in the complaint. This may be technically true, but still this fact cannot confer the equitable jurisdiction demanded, because it is necessary that the plaintiffs shall establish an undoubted right in a Court of Law, to the use and possession of the property in question, prior to filing this their bill in chancery, wherein they pray for a perpetual injunction against defendants, and it does not appear in the bill of said plaintiffs, that such disputed right has ever been passed upon or determined in a Court of Law.

In this action, as fully appears from the argument of counsel for appellants, the question is not raised as to the granting of an injunction, or the dissolution thereof, and therefore many of the authorities cited by appellants' counsel do not apply to this case. At common law, as well as under the statutes of California, upon sufficient cause shown, by affidavit or otherwise, [396] in an action at *law an injunction may issue, the

only question being as to the jurisdiction of the Court. But in this action an injunction has been issued, and is prayed to be made perpetual in plaintiff's bill, and defendants cite the following cases, which have been determined in the Supreme Court of this State. (*Gates v. Henry Teague et al.*, Oct. T. 1856; *Ritchie v. Dorland*, Jan. T. 1856; *Gregory v. Hay*, 3 Cal. 322; also, *Willard's Eq. Jur.* 392.)

Where the thing complained of is in itself a nuisance, and there is no doubt as to the plaintiff's right, the Court will interfere to stay irreparable mischief, without waiting the result of a trial. But where the thing sought to be restrained is not in itself noxious, but only something which may, according to circumstances, prove to be so, the Court will await the result of a trial at law, or of an issue awarded by itself. Hence, in case of a dispute as to the right of the enjoyment of portions of the water of a stream for manufacturing purposes, equity ought not to interfere by injunction, unless the right of complaint is capable of clear ascertainment, and then only to prevent irreparable mischief. (*Reid v. Gifford*, 6 J. Ch. 19; *The Attorney-General v. Utica Ins. Co.*, 2 Id. 370;) on motion for an injunction; resisted on the ground, first—that this is not a case properly within the jurisdiction of this Court. The Chancellor says:

"I shall confine myself to the consideration of the first point, and on that objection dispose of the case. The application for the injunction is not because it is intended to be merely ancillary to a proceeding at law. The entire and final remedy is sought in this Court. The whole question upon the merits is one of law and not of equity. The process of injunction is too peremptory and powerful in its effects, to be used in the case without the clearest sanction." (*Hart v. The Mayor and Councilmen of the City of Albany*, 3 Paige Ch. 213.)

The same doctrine is laid down in 7 Barb. 395, *Fisk v. Wilber*. The Court say: "Courts of Equity have concurrent jurisdiction with Courts of Law, in cases of private nuisance; but it is not every case of nuisance which will authorize the exercise of the jurisdiction.

In rests upon the principle of a clear and undoubted right to the enjoyment of the subject in question, and will only be exercised in a case of strong and imperious necessity, or where the rights of the party have been established at law. It is not the peculiar province of a Court of Equity to construe contracts and conveyances of water-powers, or to ascertain and define the quantity of water granted or reserved thereby. The principle upon which the jurisdiction of a Court of Equity rests, in cases of water-privileges, arises from the preventive which it can afford, in shielding a party from great and irreparable injury *which may threaten him; but the rights alleged to [397] be infringed or threatened must be clear, definite, and certain, or capable of being clearly ascertained; otherwise the party should be left to the remedy at law."

BURNETT, J., after stating the facts, delivered the opinion of the Court—TERRY, C. J., concurring.

The demurrer admits the facts as alleged in the complaint. (3 Cal. 323.)

The alleged allegation in the complaint, that the defendants wrongfully claim some pretended and fictitious right to the use of the water does not prejudice the right of the plaintiff to the injunction. (*Merced Mining Co. v. Fremont*, 7 Cal. 317.)

The diversion of a water-course is a private nuisance. (Willard's E. J. 392; Adams' E. 310; Story's E. J. Sec. 927.)

There can be no doubt of the truth of the proposition, that no equitable remedy can be had for a mere past diversion of a water-course, but where the injury is continuing, relief may be appropriately sought in equity. It is only in equity that future injury can be restrained. Continued diversion of water from a party entitled to it, is such an irreparable injury as a Court of Equity will redress.

But in this case it is insisted by the defendants that the remedy by injunction cannot be maintained, until the plaintiff has established his title by a suit at law.

The only object in establishing title at law, is to show that the right is in the plaintiff. The suit at law is only a means to accomplish a given end. When the end is already obtained, there could be no reason for doing an idle thing. This, the law, as a rational system, never requires to be done. If the title of the plaintiff be conceded, then there can be no need of a trial at law to establish that which is already admitted. (Willard's E. J. 392; 6 How. Pr. 89.)

By the demurrer in this case, the defendants admit the right of plaintiff to the water in the gulch, that they have wrongfully diverted it, and continued to do so, and refuse to desist, under a fictitious claim of right.

It is not a mere fictitious claim of right that will prevent the injunction. Suppose the defendants had stated in their answer that they admitted the right of plaintiff to the use of the water, but also insisted that they had a pretended and fictitious claim to it, then there could have been no necessity of a trial at law under such an admission. Had the defendants answered, denying the right of the plaintiff, and claiming title themselves, then a very different question would have been presented, in reference to which it is not now necessary to express any decided opinion. But it may admit of doubt whether, under our system, where the same Court administers both law and [398] equity, and the distinction in pleading is abolished, the former rule would apply, without qualification.

WALKER v. SEDGWICK.*

ESTOPPEL—GRANTOR AND GRANTEE.—A party entering into the possession of the land of another, and in subordination to his title, is estopped from denying his grantor's title.

CONTRACT, RESCISSION OF.—When a purchaser of land does not obtain the title which the deed purported to convey, and the covenants embrace, and he goes into and retains possession under the deed; and the failure of the title goes to the entire consideration paid, or to be paid, for the land, then he must seek his remedy by a rescission of the contract, alleging a paramount title in another, and offering to re-deliver possession, and account for the rents and profits.

VENDOR'S LIEN NOT LOST BY TAKING NOTES.—The vendor's lien on the land conveyed is not lost by his taking the notes of the purchaser for the purchase-money. And the lien equally exists, whether the instrument amounts to a conveyance, or merely to an executory contract.

IDEM.—ENFORCEMENT OF.—In a bill in equity to enforce the lien, it is not necessary to allege the issuance of execution under a judgment at law, previously obtained by the vendor against the purchaser for the amount due, and return of *nulla bona* to sustain the allegation of insolvency.

EXECUTION—RETURN OF NULLA BONA.—Return of *nulla bona* on an execution is only one mode of proving insolvency. Any other competent proof would be sufficient.

REMEDIES, LEGAL AND EQUITABLE, UNITED.—Where a vendor of land has taken the notes of the purchaser in payment, and brings his action thereon at law, he should, in that action, if at all, unite his equitable claim for a foreclosure of his lien—the same tribunal administering both law and equity.

IDEM.—But in a case where the party brought his separate actions, first at law on the notes, and then in equity for a foreclosure, before the adoption of this rule: *Held*, that he be allowed both his legal and equitable remedies, on payment of the costs of the latter suit.

¹ **IDEM.—OFFSET, WHEN MAY BE PLEADED.**—And if the defendant has a legal offset to the notes: *Held*, that he may plead it in the latter suit.

IDEM.—QUESTIONS OF LAW AND EQUITY COMBINED.—The objection that the proceedings may become too complex by permitting different questions of law and equity to be settled in one suit, is not sufficiently strong to overcome the plain provisions of the statute, and the substantial dictates of justice.

APPEAL from the District Court of the Fifth Judicial District, County of San Joaquin.

This case has been several times before this Court, but went off upon points not involving the merits. The plaintiff Walker was in possession of a farm, and certain personal property thereon; all of which he sold in terms to defendant Sedgwick for about seven thousand two hundred dollars. The writing was not a sealed instrument, and was not acknowledged, but was signed by both parties. In the instrument, Walker is said to sell and convey to Sedgwick the property. Under the written instrument, Sedgwick went into, and still retains possession of the land and the personal property. Some five thousand dollars of the purchase-money was paid, and two notes given for the balance. Suit was brought upon the notes and judgment had, but no execution was ever issued thereon. The plaintiff

*See same case, 5 Cal. 192.

1. Cited *Hobbs v. Duff*, 23 Cal. 627.

then filed his bill in equity to enforce his "vendor's lien" against the land, in which the insolvency of the defendant is substantially alleged. The defendant denied that plaintiff had any title to the land, alleging that it belonged to the United States, and also set up that there was a crop of grain growing upon the land, which was removed by one Myers, to whom the plaintiff had sold the crop before he sold the land to defendant, and that plaintiff had warranted the title to the premises against all persons claiming under him. The defendant asked that the value of this crop might be deducted from the amount of the judgment. Upon the trial before the Court without a jury, the insolvency of the defendant was clearly shown, as well as the other facts alleged by plaintiff. Defendant gave no evidence in support of his affirmative allegations, but moved the Court for a nonsuit upon these grounds:

1. No execution was issued.
 2. The lien, if any, was waived by the suit upon the notes.
 3. The notes were executed for balance of purchase-money of land and other property, and no vendor's lien could exist.
- This motion the Court sustained, and the plaintiff appealed.

D. W. Perley, for Appellant.

To grant a nonsuit in an equity case is a novel and extraordinary proceeding.

The Court should have decided the case upon the evidence and either have dismissed the bill for want of sufficient proof to sustain it, or else have entered a decree enforcing the lien.

It is to be hoped that this case is now before this Court for a final adjudication on the merits, and this Court will direct the Court below either to dismiss the bill, or to enter a decree enforcing the lien.

1. That the respondent Sedgwick, bought the property in controversy from Walker, and obtained possession thereof from him, under a deed or contract.

2. That he gave his notes for the purchase-money, on which judgment was afterwards obtained against him, that he is still in possession of the property, and has never paid or satisfied either said notes or judgment.

3. That with the exception of this very property which he now claims as a homestead, he has no other property whatever within reach of an execution, but is totally insolvent and bankrupt.

And as a proposition of law, from the above facts, the appellant contends that he is justly entitled to a decree enforcing a vendor's lien against the property, and that the Court below erred in not so deciding.

In support of the first and second points of fact relied on, the Court is referred to the deed—a conveyance from Walker to Sedgwick.

The attention of the Court is next directed to the judgment-roll, in the action brought by *Walker v. Sedgwick*, on the notes given for the purchase-money.

The complaint in this case was sworn to, consequently a verified answer was required and this verification was made by Sedgwick.

This answer is an admission by the defendant, Sedgwick, under oath, of the following facts:

1. That the notes then sued on were given to Walker for the two quarter-sections of land and improvements on which the lien is now sought to be enforced.

2. That Walker not only sold him the land and improvements, but also covenanted to warrant and defend the title.

The attention of the Court is next directed to the answer in this action. It distinctly admits the purchase of the property from Walker, and all other facts necessary to be admitted or proven, to show a right to the lien claimed.

The question of law now arises, upon the facts proven, as to whether the plaintiff is entitled to have a vendor's lien enforced against the property.

The appellant contends that he still has a lien, and that the Court should enforce it.

And, in the first place, it is argued that the sale of Walker to Sedgwick was of both land and personal property; that it was one entire contract; that the whole consideration was over seven thousand dollars, and that no lien can be enforced for a part of the purchase-money.

But it was the intention of the parties, at the time the sale was made, that the notes given were to be for the purchase of the land and improvements, and not the personal property. This fact is sworn to, as above shown, by Sedgwick himself, and no opposing evidence appears.

The next objection is that the vendor's lien was waived, by taking notes for the purchase-money, and by afterwards obtaining a judgment on said notes.

The proposition cannot be maintained, as can be shown by abundant authority; see the following cases: *Garrison v. Greene*, 1 J. Ch. 308; *Buscol v. Bronaugh*, 1 Tex. 326; *Eldridge v. McClure*, 1 Yerg. 84; *Warren v. Van Olstyne*, 2 Paige, 513; 2 Story's Eq. J. Secs. 1224 to 1233.)

Taking a note for the purchase-money does not affect the vendor's lien, and if part of it be paid, the lien remains for the residue.

The payment of the money will alone release the land from the vendor's lien. (*Truebody v. Jacobson*, 2 Cal. 269; see *Solomon v. Hoffman*, 2 Cal. 138.)

In the case of *Allen v. Phillips*, 4 Cal. 256, it was held that after a judgment at law, for the purchase-money, and a sale of the property under execution, that a vendor's [401] lien could be enforced by a separate proceeding in equity.

Another point of defense relied on by defendant is that the land was public land and that the plaintiff had no right or title to sell the same.

In reply to this objection, we say:

1. There is no proof of such being the fact on the record.
2. If it did so appear, it would not avail the defendant.

In an action for the purchase-money of land, conveyed without covenants, want of title in the vendor is no defense unless the vendor has been evicted. (*Fowler v. Smith*, 2 Cal. 39; *Solomon v. Hoffman*, 2 Cal. 138.)

But when land is sold, with covenants of warranty, and suit is brought for the purchase-money, and defendant pleads that plaintiff had no title, he is bound to aver and prove paramount title in another, and failing in this, his defense is defective. (*Thayer v. White*, 3 Cal. 228.)

And when the defendant contends that the notes sued on were given for a lot in which the plaintiff had no title, he must not only show paramount title in another, but he must offer to re-deliver possession, and account for the rents and profits. (*Riddle v. Blake*, 4 Cal. 264.)

The defendant having entered into possession of the land, claiming under and in subordination to his title, is estopped from questioning it. (*Hoen v. Simmons*, 1 Cal. 119.)

The next ground of defense set up is:

That he was evicted of part of the crop of barley growing on the land at the time he purchased, and therefore this lien ought not to be enforced.

To this I answer:

1. There is no proof of any such eviction.
2. He must resort to an action on this warranty. (*Jackson v. Norton*, July Term, 1855.)

The last point relied on by defendants and worthy of notice, and the one which appears most to have influenced the Court below, is this:

That the plaintiff could not proceed in equity until he had exhausted his remedy at law, and proved it by an execution issued and a return of *nulla bona*.

The appellant contends that this is entirely unnecessary.

A return of *nulla bona* is only one mode of proving insolvency. But this fact may be proved in many other ways.

The case of *Allen v. Phelps*, above cited, 4 Cal. 256, directly overthrows the doctrine contended for.

The authorities are all clear and uniform, that none of the defenses set up can avail the vendee.

The following cases are referred to: *Truebody v. Jacobson*, 2 Cal. 269; *Hoen v. Simmons*, 1 Cal. 119; *Salmon v. Hoff-*
 [402] **man*, 2 Id. 138; *Fowler v. Smith*, 2 Cal. 39; *Riddle v. Blake*, 4 Cal. 264; *Dillon v. Byrne*, 5 Cal. 485; *Skaggs v. Nelson*, 25 Miss. 88; *Clower v. Rawlings*, 9 S. & M. 122; *Hardman v. Cowen*, 10 S. & M. 486; *Mackreith v. Simmons*, 15 Ves. 330.

Otis L. Bridges, for Respondent.

The statement of the case shows that appellant had no title

to the land, that it was United States land; that he had nothing at best, but a mere possessory claim to his actual improvements.

All he had, and all he parted with, was personal property, and when he gave up possession thereof, he parted with his lien.

A vendor's lien only exists when an estate is conveyed by deed, duly executed. The party must have title, etc.

There was no conveyance here of real property, and our statute contemplates a lien to exist in the vendor only when he makes a conveyance of real property, or conveys an estate.

What is real estate or personal property? (3 Kent's Com. 401.)

A man enters upon such land, as the case shows, and makes a few improvements, and he sells the improvements and leaves; does a vendor's lien exist, and can the State law enforce it?

The case shows there was some two thousand dollars or more of personal property conveyed at the time, and of its being personal property there can be no doubt, and that respondent paid at the time over five thousand dollars, whether for the personal property, or what is called the real property, can the Court determine this?

And what are the principles of equity on this subject? And as to the application of the payment of five thousand dollars, when the parties have been silent, the Court will make the application according to the justice and equity of the case.

But the appellant here was bound to exhaust his remedy at law, before he could bring his bill to have a decree of sale upon a lien.

And to have a forfeiture of an estate, the Court will apply this payment to the land.

It seems the notes were sued, and no allegation as to any lien and judgment obtained; can a party bring another suit to enforce the lien, without exhausting his remedy at law, and the former suit? It is submitted he cannot.

BURNETT, J., delivered the opinion of the Court—FIELD, J., concurring.

The defendant having entered into possession of the land under the plaintiff, and in subordination to his title, is estopped from denying it. (1 Cal. 120, 470; *Ellis v. Jeans*, 7 Cal. 409.)

When the purchaser does not obtain the title which the deed purports to convey and the covenants embrace, and he goes into *and retains possession under the deed, and [403] the failure of the title goes to the entire consideration paid, or to be paid, for the land, then he must seek his remedy by a rescission of the contract, alleging a paramount outstanding title in another, and offering to re-deliver the possession, and account for the rents and profits. In such case he cannot be permitted to retain possession of the land, and deny the title under which he entered. (2 Cal. 286; 4 Cal. 266.) The ques-

tion whether the title of the property is in the United States, or in some one else, cannot be raised in this case. Nor can either of the parties object, for the purposes of this suit, that the instrument was not in law a conveyance *in presenti*. They have both treated it as such, and possession was had under it. (2 Cal. 141.) Both parties being estopped from denying the title, the lien of the vendor cannot be affected by giving the notes. (2 Cal. 269.) And the lien equally exists whether the instrument amounts to a conveyance, or merely to an executory contract thereafter to convey. (1 Leading Cases in Equity, 263.)

The objection that there had been no execution issued and returned *nulla bona*, was not well taken. This return is only one mode of proving insolvency. Any other competent proof would be equally efficient. The law does not require a vain thing, and to issue an execution against a person insolvent would be idle. (*Heyneman v. Dannenberg*, 6 Cal. 376.)

So, the objection, that the consideration of the notes was made up of both personal and real estate, we think not well taken. The plaintiff alleged in his complaint that the notes were given for the land, and this allegation is nowhere denied in the answer. The fact stands admitted by the pleadings, and the defendant could not raise the question.

The most serious objection made by the defendant is, that the plaintiff waived his lien by his suit upon the notes.

Under a system where equity and law were administered in different suits, and in different tribunals, it has uniformly been held, that a mortgagee might first sue at law upon the note, and afterwards proceed in equity to foreclose the mortgage. The remedies were different, and while the party could not proceed upon both at the same time, he might make his election, and first proceed at law, and then afterwards in equity. And the privileges of two remedies was as open to a vendor as to a mortgagee.

But under our system of practice, where law and equity are both administered by the same tribunal, and may be in the same suit, the reason of the former rule does not exist, and the rule itself should cease. Why should the purchaser be harassed with the costs of two separate suits to obtain the end that might be as well reached by one. The whole spirit of our system, and its leading intent, is to avoid a multiplicity of suits. This is the best feature in the system. All the party has to do is to make a concise and true statement of the facts that constitute his cause of action and defense, and then the Court will give him such relief, as by the rules of law, or equity, he may be entitled to receive.

In this case, the plaintiff should have stated all the facts, in the suit upon the notes, and asked for the proper relief, and the Court could have given him such a decree as he was entitled to have.

But as this is only a question of practice, and one that was

not settled at the time the first suit commenced; and the only injury that the defendant can suffer will arise from the costs of the second suit, we will not turn the plaintiff out of Court for that reason.

Another important question arising upon the record, has regard to the affirmative defense set up in the answer. The plaintiff, in the instrument referred to, warranted the title to the land against all persons claiming through or under him. The instrument was dated 26th November, 1852. It is alleged that a volunteer crop of barley was growing upon the premises, and that plaintiff had previously sold the same to one Myers, who entered, with the connivance of the plaintiff, and cut and removed the crop. The defendant insists that this was a violation of the covenants, and that he has the right to set-off the damages against the judgment. It is not alleged that plaintiff is insolvent, or that a suit for damages would be unavailing.

The previous sale of the crop to Myers would clearly come within the covenant, and the plaintiff would be liable for the damages sustained; and the only question is, whether the defendant can avail himself of such a defense, in an action upon the notes. If he could have set it up in the suit upon the notes, we will not, under the circumstances of this case, deny him the right to do so now. The relaxation of the rule, in favor of the plaintiff, must be equally extended to the defendant.

As before stated, the leading intent of our Practice Act was, to avoid a multiplicity of suits. And hence, a defendant may set up any "cause of action arising out of the transaction set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action." (Sec. 47.)

Where the purchaser still retains possession, and the only cause of complaint is a paramount outstanding title in another, he has not yet sustained any damage, as that outstanding title has not yet been, and may never be, enforced against him, and thus his adverse possession may ripen, by time, into a perfect title. But where the purchaser, under a deed with covenants, has been evicted by paramount title, before the purchase-money has all been paid, it is not perceived why he could not set up *the damages suffered by him, against the claim [405] for the purchase-money. So, if the purchaser has been compelled, for his own protection, to discharge an incumbrance upon the premises, created by the vendor himself, he may equally set it up, so far as it goes, whether there had been any eviction or not. In the present case, the damages alleged to have been sustained were past, and not merely prospective, or doubtful.

In this case, the proceeding on the part of the plaintiff is in equity, and the defense at law.

And as a jury is allowed in the one case, and denied in the other, it may, at first appearance, present some difficulty. But there is really no theoretical or practical difficulty in the case. That part of the case which involves questions of fact for the

jury, may be submitted to them, and the other portion reserved for the Chancellor.

And the objection that the proceedings may become too complex by permitting different questions at law and in equity to be settled in one suit, though founded in much plausibility and some truth, is not sufficiently strong to overcome the plain provisions of the statute, and the substantial dictates of justice. For whatever may be the views of jurists and lawyers, the plain practical truth is this: That every man of good business sense would much prefer setting off his claim against that of another, rather than first pay the money out of his own pocket, and then risk getting it again from the pocket of his adversary. Insolvency may exist in a thousand cases where its existence cannot be shown at the time, and may often occur in the future before the party could possibly recover in his cross-action. Parties were often ruined by the practical operation of the old rule, which seems to have been founded more in the convenience of Courts than upon the true principles of justice. Like the practice of a justice of the peace, who never heard any testimony except for the plaintiff, upon the alleged ground that the contrary practice of hearing the testimony on both sides tended to produce doubt and confusion in his own mind, the former rule may have been more simple, but still it was all on one side, and practically defeated the very ends contemplated by the law itself. Our Practice Act has wisely provided a remedy for this great evil, and has placed parties on an equal footing with respect to each other. It may possibly, in some instances, increase the difficulties in particular cases; but its general operation cannot fail to be more beneficial and just to the parties. Under the operation of the statutory rule, neither party is compelled to advance money, in the first instance, and then sue to recover it back again, in the second.

Under the view we have taken of this case, the plaintiff is entitled to a decree for the sale of the premises, subject to be reduced in amount by whatever damages the defendant may *prove himself entitled to recover, if any. And as the plaintiff failed to state all the facts, and seek all the relief he was entitled to in the suit upon the notes, he should be taxed with the costs of this suit accruing in the Court below, and the plaintiff will be entitled to the costs, upon appeal.

For these reasons, the judgment of the Court below is reversed, and the cause remanded for further proceedings, in which the only proof required will regard the question of alleged damages suffered by the defendant. The case on the part of the plaintiff having been fully established, the Court below will enter a decree for the amount of the former judgment upon the notes, after deducting the amount of damages, if any, which may be found for the defendant.

PEOPLE EX REL. DUNN v. BORING.

SHERIFF—WHEN EX-SHERIFF TO EXECUTE PROCESS.—On the election of a new sheriff, the former sheriff must complete the execution of all final process which he had begun to execute before the expiration of his term of office.

IDEM.—AUTHORITY CONSTRUED.—The authority to sell land, conferred by a writ thus in his hands, carries with it authority to execute all the instruments required by law, to the completion of the sale, viz: a certificate, and in case of no redemption, a conveyance, to the purchaser.

1 IDEM.—REMEDY OF PURCHASER AT SALE.—Where the ex-sheriff, who made the sale of land under a writ partially executed by him while in office, dies before executing a conveyance, the law having failed to provide for the completion of the execution in such a case, the only remedy left to the purchaser, is to apply to the Court for the appointment of a commissioner or master to execute the conveyance.

IDEM.—WHO MAY MAKE DEED.—Independent of statute, the Court, by virtue of its original jurisdiction, has authority to appoint a suitable person to make and deliver the deed, in the enforcement of its judgment, and that its final process may be completely executed.

APPEAL from the District Court of the Fourteenth Judicial District, County of Nevada.

This was an application on behalf of the relator, for a writ of *mandamus*, directed to the defendant, sheriff of Nevada county, commanding him to execute a conveyance of land to the relator.

The petition sets forth that the relator, in the month of June, 1856, purchased certain land in Nevada county, at a foreclosure sale, under a decree of Court duly entered, and that the sheriff executed a certificate to the relator; that before the expiration of the six months allowed for redemption of the property, the sheriff died; a sheriff was appointed in his place, who was in office when the time of redemption expired; and subsequently the defendant was elected sheriff, and now holds the office; to both of whom, relator has applied for a deed of the land so sold, and both of whom have refused so to do.

The facts stated in the petition are admitted by the defendant, who interposed a demurrer, upon which a judgment *pro forma* was entered, and the case appealed, by stipulation, without notice *or bond; both parties desiring the decision [407] of this Court upon the question.

Francis J. Dunn, for Appellants.

No briefs on file.

FIELD, J., delivered the opinion of the Court—BURNETT, J., concurring.

The fifth subdivision of section thirty-seven of the Act concerning sheriffs, requires, on the election of a new sheriff, the former sheriff to deliver over to his successor all executions, attachments, and final process, except those which he has executed,

1. Cited *Anthony v. Wessel*, 9 Cal. 104; *Clark v. Sawyer*, Cal. Sup. Ct., Jan. T., 1870, not reported.

or has begun to execute, by the collection of money, or a levy on property; and the thirty-ninth section of the same Act provides that, notwithstanding the election and qualification of the new sheriff, the former sheriff shall complete the execution of all final process which he began to execute.

The authority to sell, conferred by the writ, carries with it authority to execute all the instruments required by law to the completion of the sale, namely: a certificate, and in case no redemption is had, a conveyance to the purchaser. (*Valentine v. Piper* 22 Pick. 85.) The making and delivery of the conveyance, after the expiration of the period limited for redemption, is but the consummation of the sale, and is as much a part of the officer's duty, in completing the execution of the process, as any other proceeding after the levy. The object of the writ is to satisfy the judgment, by a sale of the property of the defendant, which would be entirely ineffectual for that purpose, if not followed by a transfer of title to the purchaser. He who begins the execution, therefore, as laid down in the old reports, must end it. In *Clerk v. Withers* (6 Mod. 290), POWELL, J., said: "Execution is an entire thing, and, therefore, when a sheriff levies goods, and while they remain in his hands, for sale, a new sheriff is chosen, he who begun the execution shall go on with it, and sell the goods, and not deliver them over to the new sheriff, who is the officer of the Court. The reason is, that execution is one entire thing, and therefore, where it begun it shall end." * * * The *venditioni exponas* is not of necessity, nor does it give to the sheriff authority to sell, but serves only to quicken the sheriff to his duty." And HOLT, C. J., in the same case, said: "Now, if a *distringas* lies for the new sheriff, to compel the old sheriff to sell, that shows an old sheriff has an authority to sell by virtue of the former writ." (*Wilbraham v. Snow*, 2 Saund. 47.)

The doctrine of the common law, that the sheriff who has commenced the execution of the writ must proceed and complete it, even after the expiration of his office, is generally recognized [408] and sustained by the adjudications of the Courts of the different States, except where modified by statutory regulations.

In *Gibbes v. Mitchell*, (2 Bay, 128,) the Court of Appeals of South Carolina, in considering whether an execution suspended by an injunction should be renewed, said: "But the Court was of opinion that such renewal was unnecessary, for the sheriff had, by virtue of the execution, made a regular levy on defendant's property on twenty-second of March, 1796, which gave him a qualified property in the negroes; so that the moment he was unfettered by the injunction, he had a right to go on, and complete the sale, and raise the money; nay, he not only had a right to go on, but was bound to do so, even if he was out of office at the time, for he who begins must end the execution." In *State v. Hamillon* (1 Harrison, 155,) the question arose as to the meaning of the word unexecuted, in the thirty-first section

of the statute of New Jersey, concerning sheriffs, which enacts "that every sheriff shall, at the expiration of his office, turn over in writing all writs executed, to the succeeding sheriff, who shall execute and return the same," and the Court said: "An unexecuted writ, then, in the sense in which that word is used in the statute, is one upon or in virtue of which nothing has yet been done. If the sheriff to whom a writ is issued, commences the execution of it, he must continue to execute it, even after he is out of office."

In *Allen v. Trimble* (4 Bibb, 23,) the plaintiff in ejectment, to establish a title to a moiety of the land in contest, introduced in evidence a deed of conveyance upon a sale under a decree, which was executed by the sheriff after his office had expired. An instruction to the jury that the deed was not valid, and passed no legal title to the land in contest, was requested by the defendant, and refused, and in considering, on appeal, this refusal, the Supreme Court of Kentucky said: * * * "The question occurs, can the sheriff, making the sale, execute a deed of conveyance for the land sold after his term of office expires? We are of opinion he may. The provisions of the Act subjecting lands to the payment of debts, evidently require the deed of conveyance to be made by the sheriff who sells the land. That Act, it is true, contains no express delegation of power to the sheriff to convey, after his term of office expires, nor do we suppose such an express delegation of power was necessary to enable him to do so; for, as the officer selling is required to convey the execution of the deed of conveyance thereby forms a necessary part of the execution of the writ; and as, according to the settled principles of the common law, he who begins the execution of a writ of *fiery facias* must end it; so now, under the statute, he who sells must finish the execution by conveying.

"It was contended in argument that as this principle of the common law grew out of the sale of chattles under execution, it should not be made to apply to the sale of lands under the statute. To this, it may be answered that it was [409] owing to the nature of the writ, and not to the description of property upon which it operated, that gave rise to the principle; and as the Legislature, in subjecting lands to the payment of debts, have adopted that description of writ whose qualities gave rise to the principle, it is but fair to presume they intended the sheriff, who might take land under a *fiery facias*, should, according to this principle, sell and convey the same, though his term of office should expire before the sale or conveyance. That the Legislature so intended, is, moreover, further manifest by their failure to provide for the successor in office to complete the execution of a *fiery facias* which might be levied on lands, and not sold by his predecessor; for, with a knowledge of the term for which sheriffs hold their office, the Legislature must have foreseen the probable occurrences of various cases where the sheriff, levying an execution on lands, could not make sale thereof during his continuance in office; and it

cannot be supposed they intended to leave those cases unprovided for. And as they have not authorized the successor in such cases to complete the execution, the inference is irresistible, that they intended that principle of the common law to prevail, which makes it the duty of the sheriff who levies, to complete the execution of the writ."

In *Lemon v. Craddock* (Littel's Select Cases, 252), the plaintiff in ejectment was purchaser under an execution issued upon a judgment against the defendant, and relied upon his conveyance from the sheriff. The sale was made by the deputy of the preceding sheriff, and the deed recited that the said sheriff and his deputy were out of office. The deed was admitted in evidence, and the motion of the defendant to reject and exclude it from the jury, as passing no title was overruled. In considering this ruling, the Court said: "It is a settled principle of the common law, recognized by sundry decisions of the Court, that the sheriff who made the sale ought to make the conveyance; and that for this purpose he is still in office, although his successor may have entered on the duties of the same office."

In *Rogers v. Darnaby* (4 B. Mon. 240), certain slaves had been levied upon by the old sheriff, which were afterwards replevied from his possession. Pending the replevin-suit, a new sheriff went into office, and on the determination of the suit, the slaves were seized by him under another execution, and the question was, which officer was entitled to them; and the Court held, as settled, that the old sheriff was vested, by virtue of the levy of the execution in his hands, with a special property in the slaves, such as would enable him to maintain trespass or trover, and was entitled to their exclusive possession and control; that he had the same property, right of possession, and control after, as before the termination of his office; and that it was his duty,

[410] on the determination of the replevin-suit, to take possession of the *slaves, and sell them in discharge of the execution in his hands. "To do this," said the Court, "he required no additional authority. The authority acquired under the original levy was ample and undiminished, and *quoad hoc*, he was still sheriff. * * * We are of opinion it may be farther assumed, and as resulting from the foregoing positions, that the old sheriff and the new, as to their respective rights, duties, and liabilities, in reference to these slaves, should be regarded as different and distinct officers, neither having the right to the slaves in virtue of the authority of the other, and neither having the right, in virtue of his own authority, to sell in discharge of the execution or claim in the hands of the other."

In *Tuttle v. Jackson* (6 Wend. 224), Chancellor WALWORTH, in delivering the opinion of the Court of Errors, said:

"It has long since been settled, and I think correctly, that the deputy who has commenced the execution of the process, by a levy on the property during the term of office of his principal, may proceed and complete the execution thereof afterwards.

The giving of the conveyance after the expiration of the time limited for the redemption of real property, is as necessary a part of the duty of the officer to complete the sale, as the putting up the property, and striking it off to the highest bidder."

In *Jackson v. Collins* (3 Cow. 85), certain premises were levied upon under an execution, and sold by a deputy-sheriff, who made and delivered to the purchaser a conveyance of the property, about a year after the expiration of the office of the sheriff; and it was objected that the deed was on that account void, but the Court said: "It is not denied that during Adams' (the sheriff), continuance in office, the deputy had authority to do any act which his principal could do in his official capacity, except the appointment of deputies. But it is contended that the authority of the deputy ceased when the new sheriff had taken the office upon him. In my opinion, the authority of the deputy is limited by the duration of the authority of his principal. An execution against the property of a defendant, partly executed by the old sheriff, shall be completed by him, and in relation to any such execution in the sheriff's hands, when he goes out of office, he continues sheriff, and may act by deputy, as if he was still in office. He is in office *quoad hoc*, and the acts of a deputy in relation to such an execution, are the acts of the sheriff himself."

We have cited the above authorities, not from any doubt that the old sheriff, by virtue of the provisions of section thirty-ninth of the Sheriff Act, is the proper officer to execute conveyances after the expiration of his office, when sales have been previously made by him, but because large and valuable estates are held in different parts of the State, under titles conveyed by deeds executed under such circumstances, to which objections are some-times taken on that ground. In ad- [411] dition to the Sheriff Act, an examination of the different provisions of the Practice Act, in relation to executions and redemption, leads to the same conclusion. Section two hundred and twenty-seventh provides, in sales of personal property capable of manual delivery, that the officer making the sale shall deliver to the purchaser the property, and, if desired, shall execute and deliver a certificate of the sale and payment. Section two hundred and twenty eighth says: In sales of personal property not capable of manual delivery, and of real property, the officer shall give to the purchaser the certificate, meaning the officer making the sale. Section two hundred and thirty-third provides, where a redemption is desired, that payment may be made to the purchaser, or redemptioner, as the case may be, or for him to the officer who made the sale. It appears clear that the words who made the sale, limit the term officer to the incumbent at the time, who performed the act of sale, and do not refer merely to the official character of the individual. Substitute the word sheriff in place of officer, and the same construction must follow; "the sheriff who made the sale" would refer to the incumbent at the time, and not merely to the officer.

In the present case, the sheriff who made the sale is dead. His death, of course, terminated the office of his under-sheriff, and of all his deputies. Neither the sheriff appointed in his place, nor his successor elected, can complete the execution of the final process under which the premises in question were sold, by the making and delivery of a deed to the purchaser. The law vests the authority in the old sheriff, who made the sale, and has failed to provide for the completion of the execution, in case of his death.

The only remedy left, therefore, to the purchaser, is by application to the Court, for the appointment of some suitable person, as master, or commissioner, to execute the conveyance. Such application should be made upon petition, stating, generally, the recovery of the judgment, the execution or order of sale issued thereon, the sale thereunder, the purchase, and such other particulars as may be necessary, to show the party is entitled to his deed, and notice of the application should be given to the defendant whose property was sold. The deed executed by a master, or commissioner, appointed under such circumstances, should recite or refer to the proceedings under which the appointment is made. In several of the States, the proceedings upon such applications are regulated by statute; but, independent of statute, the Court, by virtue of its original jurisdiction, has authority to appoint any suitable person to make and deliver the deed, in the enforcement of its judgment, and that its final process may be completely executed. (*Sickles v. Hageboon*, 10 Wend. 563; *Wilson v. Roach*, 4 Cal. 362.)

Judgment affirmed.

[412]

*PRICE v. WHITMAN ET AL.

CONSTITUTIONAL LAW—RETURN OF BILL BY GOVERNOR.—The Constitution provides that if any bill presented to the Governor (having passed both houses of the Legislature) shall not be returned within ten days after it shall have been presented to him, Sundays excepted, the same shall become a law in like manner as if he had signed it, unless the Legislature, by adjournment, prevent such return.

¹**CONSTITUTION—LITERAL CRITICISM.**—The decision in the *People ex rel. Hepburn v. Whitman*, was predicated upon an error in the printed copy of the Constitution, the word "Sunday" being there used in the singular.

²**IDEM.—RETURN OF BILL BY GOVERNOR.**—The ten days given by the Constitution must be computed by excluding the day on which the bill is presented to the Governor.

IDEM.—COMPUTATION OF TIME.—Where it is necessary to give effect to contracts and carry out the intention of parties, the first day is, by the Courts, included, or excluded, as the case requires, there appearing to be no uniform rule on the subject; but when a time for deliberation is allowed, the exclusive rule should be adopted.

APPEAL from the District Court of the Sixth Judicial District.

1. Cited *Ex parte Newman*, 9 Cal. 522; distinguished, *Taylor v. Palmer*, 31 Cal. 245.
2. Approved *Iron M. Co. v. Haight*, 39 Cal. 542.

This was a petition in the Court below for a writ of *mandamus* upon the Comptroller, Secretary of State, and Treasurer, to compel them to examine, settle, audit, and allow the claim of the petitioner, Thomas F. Price, under the provisions of a bill which passed both houses of the Legislature, and was presented to the Governor on April 8, 1856, and which is claimed to have become a law by not having been returned by the Governor within ten days thereafter, the Legislature being in session. The Journal of the Senate, where the bill originated, shows that the bill was returned by the Governor, without his approval, on the fifteenth of the month. Parol evidence was introduced in the Court below to prove that the bill was returned on the fourteenth, which is not, however, considered in this Court.

On the return of the bill, the Senate proceed to vote whether the bill should pass by a two thirds vote, as vetoed, and it failed to obtain the requisite majority.

The Court below dismissed the petition, and plaintiff appealed.

Robinson, Beatty & Botts, and Jo. G. Baldwin, for Appellant.

The bill for the relief of the plaintiff, above referred to, passed both houses of the Legislature, and was duly presented to the Governor on Thursday, the 3d day of April, 1856, and was retained by him until Tuesday, the 15th day of April, 1856, when he returned it to the Senate, being the house in which it originated, with his objections. (Sec. 17, Art. IV, of the Constitution.)

Under this clause of the Constitution, and the foregoing facts, it is contended that the bill became a law on the 14th day of April, and that the veto interposed the next day, came too late, and was therefore inoperative and void. In order to determine this question, it is necessary to ascertain and fix the day *on which the ten days began to run. If the day of the [413] presentation to the Governor be included, then the ten days expired on the 14th day of April, but if this day be excluded, then ten days expired on the 15th day of April, the day of the veto, and this is the whole question at issue.

Before making an appeal to authority, it seems to be clear, on principle, that the day of the service on the Governor should be included, for the reason that at the moment he receives the bill he can either sign or return it with his objections. It is undeniable, therefore, that in point of fact, the Governor has the day of service of the bill in which to act on it, and if this day be not included in the count, the Executive instead of having ten days in which to approve or reject, will have eleven. It may be objected to this that the object of the Constitution was to give ten clear days in which to act, and as the bill might be served on him at a late period of the day, if the day of service were included in the count, this intention of the Constitution would be frustrated.

The answer to this is, that the object of the law in computing

time, is to lay down a fixed rule, and in aid of this object, and to prevent confusion and uncertainty, fractions of a day, (unless in the single case of a question of priority of acts done on the same day,) are not computed; and it has therefore been held, from the earliest period of the common law, that where the computation is to be made from an act done, (and which is precisely this case, for the act done is the service of the bill on the Governor,) the day on which the act performed, is included.

The leading case on this subject is Clayton's case (5 Coke), where it was resolved "that a lease of three years which took effect on the twentieth day of June, should end on the nineteenth day of June in the third year; for the law in this computation doth reject all fractions and divisions of a day, for the uncertainty which is always the mother of confusion and contention; that in this case the day of the delivery of the lease should be taken, inclusive, and the day is parcel of the demise."

The authority of this case is acknowledged in *Bellasis v. Hester*, (1 Lord Ray. 280), which was an action on a bill of exchange at ten days' sight. The bill was seen and accepted the fifth of May, and suit brought the fifteenth of May, and it was contended that the action was prematurely brought, observing, "the day on which the bill was shown shall be reckoned one of the ten. For according to Clayton's case, and all the books where the computation is to be made from an act done, the day on which the act was done must be included, since there is no fraction in a day, that act relates to the first moment of the day in which it was done, and was as if it were then done."

The principle here announced was again confirmed in *Norris v. The Hundred of Gautis*, (Hob. 139), and by Lord [414] *MANSFIELD, in *Rex v. Adderly*, (2 Doug. 465); also in *Castle v. Burdett*, 3 Term Rep., 623, the Court observing that "Where the computation is to be made from an act to be done, the day of such act was to be included."

To the same effect, see *Glossington v. Rawlins*, (3 East. 407,) where the Court cite and rely on the foregoing authorities; also Sergeant Williams' note 3, to *Pinkey v. The Inhabitants de Rotel*, 3 Saunders' R., a, b; and *Pellews v. Manford*, 17 Eng. C. L. R., 72; *Osborn v. Rider*, Cro. James, 135; 4 Esp. 224; 1 Henry Bl. 14; Salkeld, 625.

The above are the principal English cases, and they are all clear and consistent.

The conflicting cases, of which there are a number, are where the computation is to be made, not from an act done, but "from date," or "from the day of the date," etc., some of the Judges holding these words to include, and others to exclude, the first day. Of this class is the case of *Pugh v. The Duke of Leeds*, Cowp. 714.

The case of *Lester v. Garland*, in 15 Ves., cited by the Attorney-General, was also a case in which a point was strained to prevent a forfeiture.

The law of England is thus laid down by a modern writer—Dwarris on Statutes, 768, 769, Law Library, 89: "When a statute limits a proceeding against a party to six months, a year, etc., after an act done, the day on which the act was done is to be reckoned in the six months, year," etc. All the other text writers, ancient and modern, lay down the rule the same way. (Com. Dig. Temp. A., 15 Vin. Ab. 554; 2 Evans, 50.)

In America, there is some conflict of authority, but the weight of it is in support of the English rule.

(*Arnold v. United States*, 9 Cranch, 119; *Pierpont v. Graham*, 4 Wash. C. C. 240; *Hampton v. Evengellie*, 2 Brown, 18; *Thomas v. Afflick*, 16 Penn. St. 14; *Barto v. Ablee*, 16 Ohio, 408; *Jacobs v. Graham*, 1 Blackf. 392; *Ryman v. Clark*, 4 Blackf. 329; *Lang v. McClure*, 5 Id. 319.)

The attention of the Court is particularly invited to the reasoning of the opinion (Judge Simpson) in the case of *Chiles v. Smith's Heirs*, 13 B. Mon. 460.

(*Dibbs v. Zeigler*, 1 Green, 164; *Temple v. Caistens*, Id. 492; *Morrison v. Cassidy*, 25 Miss. 194; *Fortiner's case*, 2 Harrington, 461; *State v. Jackson*, 1 Southard, 323; 3 Halst. 303; 7 Id. 205; *Nugent's case*, 1 Martin, 102.)

Upton & Hereford, for Respondents.

BURNETT, J., delivered the opinion of the Court.

On the 3d day of April, 1856, a bill which had duly passed both branches of the Legislature, was presented to the Governor. *The Governor returned the bill to the Sen- [415] ate, in which it originated, with his objections, and the veto was concurred in by that body. The Journal of the Senate shows that the bill was returned on the fifteenth of the same month, while it was shown, by parol proof, that it was returned on the fourteenth. The plaintiff objected to the introduction of the parol proof, to contradict the Senate Journal, but the objection was overruled, the testimony admitted, judgment was given for defendants, and the plaintiffs appealed.

The 3d day of April being Friday, there were two Sundays intervening between the 3d and 15th.

The view we shall take of this case, renders it unnecessary to decide the point as to whether the parol testimony was properly admitted or not.

The seventh section of the fourth article of the Constitution provides that if any bill presented to the Governor, "shall not be returned within ten days after it shall have been presented to him, (Sundays excepted,) the same shall be a law, in like manner as if he had signed it, unless the Legislature, by adjournment, prevent such return."

The decision of this Court, in the case of *People ex rel. Hepburn v. Whitman*, 6 Cal. 659, was predicated upon the fact that "Sunday," in the singular, was found in the printed copy of the Constitution. Upon an examination of the original copy of

the Constitution, on file in the office of the Secretary of State, it was found that the printed copy was not correct. It should be "Sundays," and not "Sunday." The correction is made in the errata to *Wood's Digest*.

The two intervening Sundays not being counted, the only question is, whether the return on the 15th, was within the ten days allowed by the Constitution; and the answer to this question will depend upon, whether the first and last days be both counted. If both are included, then the bill was not returned in due time, but if either be excluded, the bill did not become a law by lapse of time.

The cases that have arisen in the Courts of England, and those of the several States, have given rise to much critical inquiry into the meaning of terms. Perhaps no class of questions has given rise to so much verbal criticism, as cases regarding the mode of computing time. Many most refined distinctions have been raised, sustained, and then abandoned by the Courts; especially in England. In many cases the meaning seems to have been entirely explained away.

The English authorities are very fully reviewed, in the opinion of Lord MANSFIELD, in the case of *Pugh v. The Duke of Leeds*, 2 Cowp. p. 714. For a time, the distinction between the expressions "from the date," and "from the day of the date,"

was sustained, but finally it was determined that they [416] meant the same thing. And in some cases it was held that they both meant, not only the same thing, but that they were both exclusive. But in that case, Lord MANSFIELD held that the word *from*, may mean either exclusive or inclusive of the day; and whether it meant one or the other, depended upon the context and subject matter. The construction there held was inclusive.

Another distinction long held, and still maintained, perhaps, by the weight of authority, was this: When the computation of time was to commence from an act done, then the count was to be inclusive of the day; but when it commenced from a day stated, the count shall be exclusive.

But like the distinction between "from the date," and "from the day of the date," there would seem to be no substantial and good reason for it. It is a distinction without a difference. In one case, the day is expressly designated by the contract, or by the law; and in the other case, by a future event, the exact time of which could not be specified before it happened. But in both cases, the day from which the count must commence is fixed; in one case by prior statement, and in the other by an after event, and in both cases, with equal ultimate certainty. Then if we have the exact day ascertained, why should there be any difference in the two cases? From the nature of the case, the exact day can be specified in advance in the one instance, and cannot be thus stated in advance in the other; yet when the act is done, the exact day is equally ascertained. Then why should there be any difference in the mode of com-

putation? These different modes of specifying the day are adopted from necessity, but both are ultimately equally certain, and the mode of computing the time should be the same in both cases. So, the distinction between "from the date," and "within" so many days, months, or years from the date, or from the act done, is not well founded. The computation should not be at all affected by the use of these different forms of expression. The construction should be such in each case as to carry out the intention of the parties, and give effect to their contracts.

In the case of *Lester v. Garland*, 15 Ves. Jr. 248, the time was to be computed from the testator's death; and it was held, that the six months were exclusive of the day of the death. Sir William Grant, in his opinion, refers to several authorities which exclude the day of the act, and says: "Here the reason of the thing requires the exclusion of the day from the period of six months, given to Mrs. Painter, to deliberate upon the choice she would make."

The day of the date is now excluded in the computation of time on notes and bills of exchange. (Story on Notes, Sec. 211; Bills, Sec. 329.)

The regulations adopted by the English Courts, (Hil. J. 2 W. *4,) exclude the first, and include the last day. [417] The same rule is adopted by our Pr. Act, Sec. 530.

It would require more time than would be consistent with the other business of this Court, to examine *in extenso* all the authorities referred to by the learned counsel in this case. But the remarks of the learned commentator to Ves. Jr., Reports, 15; V. Jr., 248, that "of late the general rule of construction seems to have been to exclude the first day," would seem to be substantially true. It would be impracticable to lay down any rule in advance, applicable to every case that may arise. When the entire validity of an instrument or a title must fail, and the true intention of the parties be defeated unless the first day be included, then it should be done.

But when a certain time for deliberation is given, the exclusive rule should be adopted. It was doubtless the intention of the framers of the Constitution, not only to fix a definite time within which the Governor should return the bill, but also to allow him ten full days for deliberation. If this were not so, Sundays would not have been excluded. And as a fraction of a day cannot be counted, by excluding the first and counting the last day, the full time will be in general allowed the Executive. This rule substantially allows the Governor the same time as if it were computed from the exact moment the bill was presented, to the exact time when returned. It is a rule more in consonance with the reason of the case, and the fair intent of the Constitution. It also accords with the rule in civil practice in our Courts. Under all the circumstances, we think it the most satisfactory.

Judgment-affirmed.

TERRY, C. J.—I concur in the foregoing opinion. From a careful examination of all the authorities, both English and American, to which we have access, I am satisfied that there is no uniform rule for the computation of time, whether we reckon from an event or a date; the Courts generally including, or excluding the first day, as it was necessary to give effect to contracts, and carry out the intention of the parties. Thus, in the case of *Pugh v. The Duke of Leeds* (2 Cowp. 714), where, under a power to make a lease in possession, and not in reversion, a lease was executed for twenty years "from the day of the date," the Court held that the day of its execution was included. So, in the *Countess of Portland's* case, where a lease for crown-land had been taken for a term of years "from the day of the date," the statute forbidding the creation of any estate in such lands to commence *in futuro*. In these cases, such a construction was necessary to uphold the contracts.

Per contra, in the case in 15 Ves. Jr., 248 where a widow was required by will to give bond, within six months after the testator's death, that she would not contract a second marriage, and *the bond was executed on the last day of the time limited, excluding the day of testator's death, it was held to be a compliance with the terms of the will.

The masterly review of the English cases by Lord MANSFIELD, in *Pugh v. The Duke of Leeds*, shows conclusively their entire want of uniformity.

The American authorities are equally conflicting. The decisions of New York, Massachusetts, South Carolina, Texas, and Pennsylvania, are opposed to those of Ohio, Indiana, Kentucky, Iowa, New Hampshire and Delaware. The Constitution intends that no bill shall become a law without the concurrence of the Governor and a majority of each house of the Legislature, or two thirds of each house. The assent of the Executive is presumed after a silence of ten days; but if, within this time, the bill is returned without approval, it is defeated, unless passed by a vote of two thirds of each house.

In this case the bill was, within ten days, exclusive of the day of its presentation to the Governor, returned to the house in which it originated, and the Executive veto was concurred in; so, it clearly appears that it was not the will of the Governor, or of a constitutional majority of the Legislature, that it should become a law.

Under these circumstances, if the current of decisions was uniform and consistent, we might feel constrained, by the weight of authority, to adhere to the rule established; but the decisions being, as we have shown, in conflict, I think we should follow the example of the English Courts, and construe the clause so as to carry out, and give effect to the intantion of the framers of the Constitution.

The judgment should be affirmed.

FISHER v. WHITE ET AL.

LIEN ON BOATS AND VESSELS, WHEN IT ATTACHES.—In actions against boats and vessels, under the statute, the lien attaches only when service is had in the suit.

IDEM.—It was not the intention of the Legislature to make the lien attach when the liability was incurred.

APPEAL from the District Court of the Twelfth Judicial District.

This was an amicable suit, to determine the right of possession to the steam-tug *Mary Ann*. On the 3d of November, 1854, the Humboldt Lumber Manufacturing company, mortgaged the vessel to A. S. Tobias, the vessel being left in the possession of the company. On the 2d of April, 1855, a new mortgage was executed, and Tobias wrote across the face of the original mort-gage, as recorded, the words: "I ac- [419] knowledge to have received full satisfaction of the within mortgage, and of all demands, to date." No money, however, was paid, and Tobias made the memorandum at the request of the clerk of the custom-house, who said such a discharge was necessary before the new mortgage could be recorded. Tobias, at the date of the second mortgage, took possession of the vessel, and on the 10th of August, 1855, assigned the mortgage, and transferred the possession of the vessel to plaintiff, who commenced his suit to enforce his lien against the vessel, on the 4th of October, 1855, which suit was still pending, after the commencement of this suit in the Court below.

On the 31st of May, 1856, defendant White recovered judgment against the vessel for the mal-performance of a contract for the transportation of property, on the 6th of December, 1854. In that action an attachment was issued, and the vessel seized by defendant, Reed, as sheriff, on the 21st of April, 1856; and on the 13th of June, 1856, execution was issued and placed in Reed's hands. At the time Fisher purchased the mortgage from Tobias, he knew of White's cause of action. The mortgages were both duly recorded in the custom-house, at San Francisco. White knew of the existence of the mortgages. He was a stockholder in the company, and was a defendant in the suit of Fisher, to enforce his lien. Judgment was given for plaintiff, and defendants appealed.

S. M. Bowman, for Appellants.

First—The judgment is against the maritime law.

The liability of the vessel to answer for the non-execution or mal-performance of a contract of affreightment, at common law, entered into by the owners, agent, or master, will not be seriously questioned.

• "By the general maritime law, every contract of the master, within the scope of his authority as master, binds the vessel, and gives the creditor a lien upon it for his security." (*The Paragon*, Ware's R. 322.)

The ship and freight are, by the marine law, bound, in specie, to the performance of every contract, made by the master, within the scope of his authority. (3 Kent. 204; *The Waldo*, Davies, 161; *Hewitt v. Bush*, 17 Me. 147.)

His lien is not defeated by a *bona fide* sale of the vessel before he has had an opportunity of enforcing it, and still less when the purchaser has a knowledge of the claim. (*The Rebecca*, Ware, 188.)

There must be a knowledge of the injury on the part of the claimant, and a manifest intention to abandon the claim, to discharge the vessel from liability. (*The Robert Morris v. [420] William-son*, 6 Ala. 50; *The Reeside*, 2 Sum. 467; *The Brig Casco*, Davies, 184.)

But the counsel for the respondent insists, that notwithstanding such is the maritime law, they claim under a deed of sale, proved to be a mortgage, dated prior to the commencement of our suit against the tug, and prior to our attachment, and that we are cut out of our lien by such transfer; and that in order to protect our claim, it is necessary we should have had the possession of the vessel under our attachment.

This view of the case arises from the improper understanding of the term lien, when employed in cases of this kind. The appellant, White, cannot be said to have had a lien on the vessel, strictly speaking, until the levy of his attachment. Up to the levying of the attachment he had a claim or privilege which was perfected into a lien the moment the attachment was levied. In the language of the books:

"The lien is enforced because it is of a marine nature, and the moment its existence is established the jurisdiction of the admiralty attaches *proprio vigore*." (Flander's Mar. Law, Sec. 242; Dom. Civ. Law, Sec. 1736; in the case of the *Brig Nestor*, 1 Sum. 81; Fland. on Ship'g, p. 173; Angel on Carriers, p. 670, 673.)

Second—The judgment is against the statute.

The statute ordains that, "All steamers, vessels and boats, shall be liable:"

1. For supplies.
2. For services rendered on board.
3. For materials furnished for construction or repairs.
4. For wharfage and anchorage.
5. For mal-performance or non-performance of contracts of affreightment.

6. For injuries committed by them to persons or property.

It follows in the precise track of the maritime law, and recognizes its well settled principles. It gives the remedy directly against the vessel, by attachment according to the admiralty practice; and it has always been held and construed by the U. S. District Court, as having been intended by the Legislature to give the same rights and remedies against domestic vessels plying on the waters of this State, afforded at common law in admiralty against merchant ships.

Section 328 provides that in case the attachment is not dis-

charged, and a judgment be recovered and execution issued, the sheriff shall sell the vessel, and shall apply the proceeds to the payment of the judgment and costs. The only preference given over the judgment-creditor, is in case of claims for wages of "mariners, boatmen and others employed in the service of the vessel," which must be first paid; and section 329 shows how such privileged claimants shall intervene for their interest in the proceeds.

*But the entire act proceeds upon the idea of the common law, and makes no distinction between a mortgagee and an owner. It makes the vessel directly liable, regardless of ownership. The mortgagee is in fact the conditional owner. His right is to the title of the vessel. It is of the ownership. The owner cannot defeat our judgment, and how can a mortgagee, who derives all his right and title from the owner, do that which the owner cannot do?

A law similar to ours exists in the State of Illinois, in regard to which the Supreme Court of that State says: "These provisions clearly create a lien in favor of those engaged in the running and management of a vessel, and those furnishing her with materials or supplies. The lien attaches the moment the liability is incurred. It is acquired by force of the statute and not by force of the levy, as in the case of an ordinary attachment." (*Germain v. Steam-tug Indiana*, 11 Ills. 371.)

The Illinois statute employs the same language as ours. Boats and vessels of all description shall be liable. The only material difference between the two is, the Illinois statute requires the claims to be enforced within three months, while ours prescribes no limit of time.

Whitcomb, Pringle & Felton, for Respondents.

In the case of *Meiggs & Pray v. David Scannell*, decided at the April Term of this Court, the Court withheld its opinion upon the question, whether the causes of action recited in our statute against boats and vessels, are liens from the time of the accruing of the cause of action. That is the first question, to which we ask the attention of the Court in this case; but as we have already said as much on that point as was reasonable, in the respondent's brief, filed in that case, we here beg leave simply to refer the Court to the brief there filed, adding only in this place, the suggestion that the present case is a good illustration of the danger of allowing these causes of action to take rank, as admiralty liens.

But secondly, the respondent holds that even if the Court accedes to the general principle contended for by the appellant, viz: that these causes of actions are liens from the time of the accruing of the cause of action, yet the mortgage is entitled to a preference here. For now we are appealing to admiralty law, which has no iron rule of preference, but balances all the equities of each case.

Here, the respondent Fisher and the original mortgagee, are

purchasers for valuable consideration. True, Fisher knew of the damage when he took the mortgage; but the damage might possibly not have resulted from the fault of the carrier; the non-performance of the carrier's contract might very well have happened from causes beyond the carrier's control. The [422] *liability was not inevitable, and the mortgagee had good reason to suppose that the claim of White would never have been set up. White delayed an unreasonable time, from December 6, 1854, to April 21, 1856, nearly two years.

White was himself a stockholder of the company (the mortgagor), and thus himself equitably a mortgagor, and this suit is not brought until a foreclosure is actually commenced, and himself a party defendant.

If the Court is sitting as a Court of Admiralty, it will refuse its aid; under such circumstances, against the mortgagee, an uncertain cause of action, not of a favored class, as for supplies, work or labor, etc., and delayed until after a new liability, by specific contract, is incurred.

But perhaps the strongest ground of the defendant, is, that there was an actual favor in favor of the mortgagee of the appellants claim.

The mortgage was originally made before the appellant's cause of action arose, but no possession was taken by the mortgagee. But, substantially, a new mortgage was affected four months after the appellant's cause of action arose, and then the mortgagee took possession. This mortgage was executed by the company of which the appellant was a member, the appellant making no claim, and it does not appear that the then mortgagee had any notice of his claim. Whatever question might have arisen under the first mortgage, the circumstances under which the second was executed, certainly amounted to a clear waiver in favor of the mortgage of the appellant's floating claim.

The decisions of this Court have been very strong on the doctrine of waiver, and are too familiar to require reference.

BURNETT, J., after stating the facts, delivered the opinion of the Court—TERRY, C. J., concurring.

The important question arising in this case is whether the statute gives a lien from the time the cause of action accrued, or only from the time the suit is commenced. If the lien commences when the cause of action accrued, then White would be entitled to satisfy his judgment in preference to the mortgage, conceding that he has not waived his priority, and that the first mortgage was discharged by the taking of the second.

In the case of *Averill v. The Steamer Hartford* (2 Cal. 422), it was held that service upon a person standing in a particular relation to the vessel, was equivalent to an actual seizure of the thing, for the purpose of conferring jurisdiction upon the Court from which the process issued. And, in the case of *Meiggs v. Scannell* (7 Cal. 405), it was held, that the lien attached to the vessel when the service was had in the suit.

These decisions, especially the last, would seem substantially *to determine this point. In the last case, the [423] opinion of the Court says: "The lien of the plaintiff, in the suit of *Conway v. Madonna*, attached as soon as the service was had in that suit." If the lien *then* attached, it did not exist before.

The learned counsel for the defendants referred us to the case of *Germain v. The Steam-tug Indiana* (11 Ill. 525), in which the Court held that the statute of Illinois did create a lien the moment the liability was incurred; but the statute of that State expressly provides that "no creditor should be allowed to enforce the lien created" by the Act, unless suit be instituted "to enforce such lien within three months after the indebtedness accrues, or becomes due according to the terms of the contract." (Rev. Stat. 71, 72.) And the only remedy provided for by the statute is, an attachment of the vessel. So, the statute of Missouri expressly creates a lien, and gives only the remedy by attachment. (1 Rev. St. 1845, p. 181.)

There is nothing in our statute expressly creating a lien. And, from the fact that there is no express provision to this effect, and the word lien is studiously omitted, and no time is limited, within which proceedings should be commenced, and that a suit may be brought by the service of the summons, without attachment, it would seem not to have been the intention of the Legislature to make the lien attach when the liability was incurred. The intention of the Act was to give priority to the most diligent creditor, except claims for wages, which are preferred before all the others mentioned in the statute.

This view of the case renders it unnecessary to decide the other questions raised by the counsel of respondent

Judgment affirmed.

THE PEOPLE v. DEMINT.

CRIMINAL PRACTICE—ORAL CHARGE, WHEN ERRONEOUS.—In criminal cases it is error to charge the jury orally, without the consent of parties.

APPEAL from the Court of Sessions of Sacramento County.

The defendant, A. F. Demint, was indicted for an assault, with intent to commit a rape. On the trial, the Court charged the jury orally, without the consent of parties. The jury found a verdict of guilty. Motion for new trial made and overruled, and prisoner sentenced to one year's imprisonment, from which he appealed.

Smith & Hardy, for Appellant.

W. T. Wallace, Attorney-General, for the People.

1. Cited *People v. Woppner*, 14 Cal. 438; *People v. Chares*, 26 Cal. 79; *People v. Trim*, 87 Cal. 273; *People v. Sanford*, 43 Cal. 35; *People v. Bonds*, 1 Nev. 36; *Rakes v. People*, 2 Neb. 164. See *People v. Payne*, ante 341.

[424] *TERRY, C. J., delivered the opinion of the Court—
BURNETT, J., concurring.

On the trial of this case the Court below charged the jury orally, without the consent of parties.

The Act amendatory of an Act to regulate proceedings in criminal cases, passed May, 1855, provides that "in no case shall any charge, or instruction, be given to the jury otherwise than in writing, unless by the mutual consent of the parties."

This provision is mandatory, and any departure from it is error. (See *People v. Beeler*, 6 Cal. 246.)

Judgment reversed, and cause remanded.

LEE v. EVANS.

1 DEED AS MORTGAGE.—PAROL EVIDENCE, WHEN NOT ADMISSIBLE.—Where the plaintiff filed a bill in equity, setting forth that he held a deed of land, absolute on its face, from the defendant, but averring that it was in fact a mortgage, made to secure a loan payable in six months, with interest: *Held*, that he could not introduce parol evidence to prove that the deed was only intended as a mortgage.

IDEM.—Except in cases of fraud or mistake, it is no more competent to prove by parol that a conditional deed was intended as a mortgage, than that a mortgage was intended as a conditional deed.

ANSWER, ADMISSIONS BY FAILURE TO DENY.—Where the answer, while averring that the deed was a conditional deed, admits that the money was received by defendant, on the understanding that if the money was repaid in six months, with interest, plaintiff was to re-convey, and does not specifically deny that the money was loaned: *Held*, that it virtually admitted the loan.

MORTGAGE, FORCE OF.—The allegation in the answer that unless the money was returned, the property should remain in the plaintiff, does not change the nature of the contract. This is the usual form of a mortgage.

2 IDEM.—If a mortgage at the beginning, the instrument always remains a mortgage.

3 ADMISSIONS, EFFECT OF.—The intent of the statute is fully carried out by excluding parol testimony; but where parties admit the real facts of the transaction in their pleadings, those admissions are to be taken as modifications of the instrument.

APPEAL from the District Court of the Tenth Judicial District, County of Yuba.

The plaintiff alleges in his complaint that he loaned the defendant the sum of five thousand dollars for the period of six months, at the monthly interest of three per cent. That to secure the payment, he took from the defendant at the same time, a deed for certain premises in fee-simple. That the deed, though absolute on its face, was intended as a mortgage, and then prays the Court for judgment, and for a sale of the prem-

1. Approved *Low v. Henry*, 9 Cal. 548, 553. Commented on *Arguello v. Edinger*, 10 Cal. 160. Overruled *Pierce v. Robinson*, 13 Cal. 124.

2. *Smith v. '49 & '50 Q. M. Co.*, 11 Cal. 246.

3. Cited *Gray v. Palmer*, 9 Cal. 640; *People v. Whitman*, 10 Cal. 45; *Perkins v. Thornburgh*, *Id.* 191.

ises. The defendant, in his answer, admits that he received the money from plaintiff, and made the deed, but insists that it "was in fact to operate as a conditional sale;" and "that if the said sum of money, with three per cent. interest per month, should be paid back, or refunded to the plaintiff, at the expiration of the six months, the property was to be re-conveyed to the defendant." On the trial in the Court below, only one witness was examined, whose testimony went clearly to sustain [425] the allegations of the complaint.

Judgment was given for defendant, and plaintiff appealed.

Field, for Appellant.

The determination of this case involves a consideration of the admissibility of parol evidence in equity, to show that a deed absolute on its face was intended by the parties as a mortgage. That such evidence is admissible in cases of fraud, accident, or mistake, seems settled by the uniform decisions of the English and American Courts. Mistake, accident, and fraud, are special grounds of equity jurisdiction, and may be proved in all cases of written instruments. A Court of Equity, acting upon well-settled rules, would interfere where one of these circumstances exists. But whether parol evidence is admissible in the absence of any of those circumstances, there is some conflict in the authorities, although the weight of authorities is, I think, in favor of its admissibility. (4 Kent, 143; Mr. Justice STORY in *Taylor v. Luther*, 2 Sum. 233; the same language is used by Mr. STORY in *Jennings v. Eldredge*, 3 Story, 293; in *Clark v. Henry*, 2 Cow. 332; *Whitlick v. Kane*, 1 Paige, 206; *Van Buren v. Olmstead*, 5 Paige, 10.)

In *Lane v. Shears* (1 Wend. 437), which was not a case in equity, Justice SUNDERLAND uses this language:

"A conveyance of property absolute in terms, if intended by the parties to be a security for debt, is a mortgage, and such intentions may be manifested, either by a written defeasance, executed simultaneously with the deed, or by the acts or parol declarations of the parties." (*Hodges v. The Tennessee Marine and Fire Insurance Company*, 4 Seld. 419; *Kunkle v. Wolfersberger*, 6 Watts, 127; see also *Wright v. Bates*, 13 Vt. 348; *Bentley v. Phelps*, 2 Woodb. & M. 426.)

The absence of any bond, note, or covenant, to pay the money, does not make the deed less effectual as a mortgage. (4 Kent, 145; *Floyer v. Lavington*, 1 P. Wms. 268; *Cope v. Cope*, 2 Salk. 449; *Ancaster v. Mayer*, 1 Bro. Ch. Ca. 464; *Smith v. People's Bank*, 11 Shep. Me. 195; *Brown v. Dewey*, 1 Sanf. Ch. 56; *Miami Exporting Co. v. Bank of U. S.*, Wright 252; *Bank, etc., v. Sprigg*, 1 McLean, 183.)

The fraud mentioned in some of the cases, as one of the circumstances determining a Court of Equity to admit parol evidence, will be found, upon examination, to consist in a denial by the grantee of the fact, that such deed was intended as a mortgage, and in attempts to use and dispose of the property as

his own, and not in any false representations made, or deceit practised at the time of the execution of the instrument. Thus, in *Strong v. Stewart* (4 John. Ch. 168), the fraud alleged, [426] *consisted in the attempt of the defendant to convert the loan into a sale. And in Vermont, in cases of this kind, the Courts proceed upon the ground, that an attempt to set up such an instrument as an absolute conveyance, is a fraudulent use of it, and therefore a proper ground upon which a Court of Equity will act. (*Wright v. Bates*, 13 Vt. 849.) And Judge STORY very justly observes in *Taylor v. Luther* (2 Sum. 233), quoted above: "It is the same if it (the defeasance,) be omitted by design, upon mutual confidence between the parties, for the violation of such an agreement would be a fraud of the most flagrant kind, originating in an open breach of trust against conscience and justice."

Now, in the case at bar, had Lee, the grantee, attempted to treat the instrument as an absolute conveyance, Evans, the grantor, could have filed a bill to redeem, and upon the facts established in this case, would have been entitled to a decree. If Evans, the grantor, could thus have treated this instrument as a mortgage, there is no reason why Lee, the grantee, should not also treat it as a mortgage. When the instrument has been once established as a mortgage, all the incidents of a mortgage follow.

In *Jaques v. Weeks* (7 Watts, 268), Justice SERGEANT remarks, "when it is once ascertained that the conveyance is to be considered and treated as a mortgage, then all the consequence appertaining in equity to a mortgage, are strictly observed, and the right of redemption is regarded as an inseparable incident."

In my argument, thus far, I have not referred to the answer. The complaint is verified, and its allegations, not specifically contested, are to be deemed admitted. (Pr. Act, Sec. 65.) Its allegations as to the loan, its amount, its rate of interest, the period for which made, and the simultaneous execution of the deed as security for the same, are not specifically controverted. They must therefore be taken as true. The partial admission in the answer does not supply the want of the specific denial. But without invoking the aid of the statute, as to the effect of the allegations of the complaint as evidence for want of denial, the partial admissions of the answer are conclusive.

The very condition here stated, attached to an absolute conveyance, would constitute the instrument a mortgage beyond all question. It is almost in the language of the ordinary defeasances contained in the instruments, which are termed "mortgage-deeds," and which constitute the ordinary form of mortgage in use. This defeasance being established by parol, or what is better, being admitted in the answer under the oath of the defendant, renders the instrument a mortgage—so to be treated in equity.

Bryan & Filkins, for Respondents.

[427] *In sustaining his application, the appellant does not

charge fraud nor does he allege any accident or mistake to have occurred in giving him the largest title he could ask for, it being a *fee-simple* title.

We desire him to hold under his deed, and hold the land. The face of the instrument then, being against him, he seeks to make his deed absolute—a mortgage—by introducing parol evidence of the contract between the parties.

1. Parol evidence is not admissible in a Court of Equity to vary written instruments except in cases of fraud, accident, or mistake. (1 Johns. Ch. 429; 1 Hill, 606; 6 Hill, 219; 1 Greenl. Ev. Secs. 275, 276, 277, 278; 1 Phillips' Ev. 548, 566; 2 Starkie Ev. 544, 577; 2 Story's Eq. Secs. 15, 31.)

So, accepting a deed from a grantor acts as an estoppel. (*Murphy v. Barrett*, 1 Law R. 106.)

Recitals in a deed, bind all parties to the deed. (5 Ham. 194; 7 Ham. 227.)

It is well settled that a party cannot dispute his own title or impeach his own deed in a Court of Equity. (Harrington's Ch. 414.)

So, also, parties and their privies are estopped by their deeds, as a party is estopped after the acceptance of a deed, from denying title to himself. (5 Ham. 194; 6 Ham. 87; 7 Ham. 227; 1 Greenleaf's Ev. Secs. 22, 23, 24 and 211.)

It is undoubtedly law, and none will question it, that the grantor in a deed can question and explain the same for the purpose of making it a mortgage, where he charges fraud, accident, or mistake, in the procuring of the instrument.

But a grantee, as in this case, cannot, in any event, diminish the dignity of his own title by pretending that his deed absolute is a mortgage, against the remonstrance of the grantor, and especially when this is sought to be done by parol proof, without any charge of fraud, accident, or mistake.

Counsel for appellant first cites 4 Kent, 143, with quotation, to support the position that a deed can be proven by parol evidence to be a mortgage, but the end of his quotation shows the very rule for which we contend, for the author there says: "for parol evidence is admissible in equity to show that an absolute deed was intended as a mortgage, and that the defeasance has been omitted or destroyed by fraud, surprise, or mistake."

The second case upon plaintiff's brief, the case of *Taylor v. Luther*, 2 Sum. 233, is a case of most palpable fraud, and the same, it clearly appears from the case, was charged in the bill.

So, in *Jennings v. Eldredge*, 3 Story, 293; and in the fourth case cited from 2 Cow. 332, of *Clark v. Henry*.

Whillock v. Kane, is a case where those claiming through the *grantor of a deed absolute upon its face, [428] try to show it a mortgage.

The bill alleges ignorance, on the part of the grantors, of the contents of the instrument.

So, fraud is alleged in *Van Buren v. Olmstead*, 5 Paige, 10.

Lane v. Shears, 1 Wendell, is another such case and is referred

to in appellant's brief, and the case of *Hodges v. The Tennessee Marine and Fire Insurance Company*, also cited, has nothing in it but an allusion to the other cases, heretofore cited in appellant's brief, giving the same rule.

But nowhere do we find such a case, except there be mistake charged in the instrument, or surprise, or fraud of some character, either actual or constructive, and nowhere does a grantee attempt to make his fee-simple a mortgage.

In *Kunkle v. Wolfsberger*, Judge Gibson says: "A formal conveyance can certainly be shown, by extrinsic proof, to be a mortgage," and that is all he says in the above case which could bear upon this.

This we have already conceded, where a grantor seeks to explain the instrument he executed, as is the case decided by Judge Gibson, upon the ground of fraud, mistake, or surprise.

The same rule is stated in *Miami Exporting Co. v. The Bank of the United States*, Wright, 252.

(*Hughes v. Edwards*, 9 Wheat.) The remarks of the Court in that case are mere dicta.

The point was not made in the case by appellant's counsel, and was not before the Court. The case upon which the Court are commenting, in *Wheaton*, was a case where the grantor, as heretofore, in all of the cases cited, is proved to have given his deed absolute, when the same was intended as a mortgage.

The language of the opinion is loose, and is not borne out by any case, either in England or the United States.

In *Stevens v. Cooper*, 1 Johns. Ch. 429, Chancellor Kent uses the following language:

"The general rule is certainly not to be questioned or disturbed. It ought not to be a subject of discussion. It is well grounded in reason and policy, as it is in authority." (See *Webb v. Rice*, 1 Hill, 608; 6 Hill, 219.)

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

There are two questions arising upon the record in this case:

1. Whether the *grantee* in a deed, absolute upon its face, can be permitted to show, by parol proof, that it was only intended as a mortgage, without alleging and proving fraud, accident, or mistake, in the creation of the instrument?

2. If not, whether the answer substantially admits the allegations of the complaint, so as to dispense with the proof?

[429] *We have been referred to a number of authorities, by the counsel on both sides. The points raised have not been heretofore decided by this Court. The importance of the principles involved will justify us in reviewing most of the authorities cited.

Chancellor KENT (4 Kent, 143) says: "Parol evidence is admissible in equity, to show that an absolute deed was intended

as a mortgage, and that the defeasance had been omitted or destroyed by fraud, surprise, or mistake." In the case of *Taylor v. Luther* (2 Sum. 233), Mr. Justice STORY says: "It is the same if it be omitted by design, upon mutual confidence between the parties; for the violation of such an agreement would be a fraud of the most flagrant kind, originating in an open breach of trust, against conscience and justice." This was a bill in equity to redeem, in which there was no fraud, accident, or mistake in the creation of the deed, and the relief prayed for was granted. In the subsequent case of *Jenkins v. Eldridge* (3 Story, 293), the same learned Judge, after quoting the passage from 4 Kent, 143, says: "In the case of *Taylor v. Luther*, I had occasion to carry the doctrine one step further, and to say that it is the same, if it be omitted by design, upon mutual confidence between the parties." He then refers to the case of *Morris v. Nixon* (1 How. 118), as fully sustaining his decision. The opinion in the case in Howard seems certainly to sustain the view of Mr. Justice STORY, although a part of the proof in that case was a letter written by the grantee, about the time the deed was made.

In the case of *Clark v. Henry* (2 Cow. 324), there was mistake, and the case is not in point. So in the case of *Whitlick v. Kane* (1 Paige. 202). In the case of *Van Buren v. Olmstead* (5 Id. 10), the bill was filed by a creditor of the grantor, alleging a fraudulent conveyance of the land, by deed absolute upon its face, but only intended as a security. The Chancellor (WALWORTH) found there was no fraud proven, but held that it was competent for the creditor to show, by parol proof, that the deed was only intended as a mortgage.

In the case of *Webb v. Rice* (1 Hill, 606), it was held that in ejectment, by the grantee of a deed absolute on its face, and recorded as such, against persons claiming by deed subsequent, from the same source, the plaintiff's recovery might be defeated by oral evidence, that his deed was intended as a mortgage. NELSON, C. J., and COWEN, J., considered the case as within the prior decisions of the Supreme Court of New York, while Mr. Justice BRONSON delivered an able dissenting opinion, in which he states that he was "the more encouraged to do so, in finding that his brethren agreed with him in principle, whatever they might think on the score of authority." The same learned jurist expressed the decided opinion that such evidence was inadmissible, both at law and in equity. The [430] case was taken, by appeal, to the Court of Errors, where the judgment was reversed, and where it was held that such evidence was not admissible in a Court of Law.

But the doctrine of this case seems to have been overruled in the late case of *Hodges v. Tennessee Marine and Fire Insurance Company* (4 Sel. 416).

This was simply an action upon a policy of insurance; Slamm was the owner of a hotel, which he insured, and on the same day conveyed the property by deed, absolute upon its face, to

the plaintiff. Four days afterwards, Slamm assigned the policy to plaintiff, with the assent of the company, "as collateral security." The property insured was afterwards destroyed by fire. The company insisted that at the time of the assignment of the policy, Slamm had no insurable interest in the premises, having previously conveyed them to plaintiff, and thus ended the policy. The only answer to this objection was, that the deed was only intended as a mortgage. The question decided—by five judges against three—was that in such an action, it was competent for the plaintiff to show by parol evidence, that the deed was only intended as a mortgage.

In the case of *Kunkle v. Wolfersberger* (6 Watts, 130), Chief Justice Gibson held that "a formal conveyance might certainly be shown to be a mortgage by extrinsic proof." The same doctrine is held by the Supreme Court of Vermont, in the case of *Wright v. Bates & Niles* (13 Vt. 341). The case of *Benley v. Phelps* (2 Woodb. & M. 426), is not in point, as there was a written defeasance proved in the case. In the case of *Miami Ex. Co. v. Bank U. S.* (Wright, 252), the Supreme Court of Ohio held that "whether a conveyance be a mortgage or not, is determined by its object. If given as a security, it is a mortgage whatever may be its form. This is so, whether the condition of defeasance form a part of the deed, or is evidenced by other writing, or exists in parol. The fact of its being given as security determines its character, not the evidence by which the fact is established." The same doctrine is held by Mr. Justice McLEAN (1 McLean, 183). So, also, in the case of *Hughes v. Edwards* (9 Wheat. 495).

The doctrine so clearly stated, in the extract given from the opinion of the Supreme Court of Ohio, delivered by Mr. Justice WRIGHT, seems to be sustained by the decisions of Vermont, Pennsylvania, Ohio, and those of the Supreme Court of the United States, as well as by the separate opinions of Justices STORY and McLEAN. It must also be conceded that the greater number of the New York decisions are to the same effect.

But with the utmost deference for authorities so high, I must confess I could never see the reason upon which these decisions rest. The language of the statute is exceedingly clear [431] and ex-plicit. "No estate or interest in lands, other than leases, for a term not exceeding one year, nor any trust or power, over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed, or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing." (Sec. 6.) The language of the statute is not only clear, but negative, and, therefore, restrictive, and not directory; and the act itself points out the exceptions to the rule therein laid down. And when a statute is not only negative and restrictive, but, in addition to these, assumes itself to point

out certain exceptions, can a Court, by any recognized rule of construction, go further, and say the law-giver forgot exceptions he intended to, but did not specify? Is it not in essence a legislative Act? Are we not saying, the law should have been so made, but was not?

The question is one solely relating to evidence. What shall be competent evidence to prove certain facts? The statute says, none but written testimony will do, and the Courts say oral testimony is sufficient. Is not this a plain contradiction of the statute?

The general rule, that parol shall not be received to contradict written evidence, is founded in true policy, and in good sense. Why should parties state, in solemn instruments, that which is not true? These instruments assume to state the truth, and the whole truth; and if parties will state that which is untrue, should they not justly suffer the consequences? Is not the rule that parties must be held to mean what they say, the plain, honest, simple, and correct rule at last? It is intelligible, certain, and practical; and if always fairly carried out, will, in the end be most useful. If not, the Legislature should correct it. Where exceptions are intended, they should be specified. And if the Legislature intended none, then the Courts should not create them.

Many of the learned Judges who have sustained the doctrine that a deed, absolute upon its face, may be shown by parol proof, to be only intended as a mortgage, have endeavored to reconcile the rule with the statute.

Thus, Mr. Justice McLEAN says, in the case already referred to: "In cases of trust, equity will sometimes treat a deed, absolute upon its face, as a mortgage, but in doing this, parol proof is not heard in contradiction of the instrument, but in explanation of the transaction, to prevent a perpetration of a fraud by the mortgagee." Now, I confess, I cannot understand the force of this explanation. The rule that "treats a deed absolute upon its face, as a mortgage," certainly contradicts the instrument. A *written instrument speaks for itself, and [432] if you make it mean contrary to what it says, there must be a contradiction.

Nor can I understand how the parol evidence can be received, "in explanation of the transaction," without contradicting the instrument, for the reason, that the instrument and the parol testimony both assume to state the transaction; and as they differ, they must naturally be in contradiction. They both historically relate the same transaction, and the one says it was an absolute sale—the other, it was not such, but a mere mortgage, and is not this a plain contradiction? If A, gives his note to B for five hundred dollars, and A seeks to prove, by parol evidence, that it was only intended as a note for three hundred dollars, is not this a contradiction? And if the instrument, (the very end and purpose of which is, to state the contract as it was,) says the sale was absolute, and the parol evidence says it was no

sale but only a mortgage, there must be a clear conflict between the two classes of testimony.

And Chief Justice GIBSON, in the case already referred to, says: "A formal conveyance may certainly be shown to be a mortgage by extrinsic proof, while a formal mortgage may not be shown to be a conditional sale by the same means. In the one case, the proof raises an equity consistent with the writing, and in the other would contradict it." But here, again, I must confess I cannot see the reason of the distinction. To say that a deed absolute is a mere mortgage is no contradiction—while, to say a mortgage cannot be made a conditional sale, without a contradiction, is making a distinction without a difference. If two different witnesses should testify in relation to a transaction concerning personal property, and the one should say it was an absolute sale, and the other that it was only a pledge, I suppose there could be no doubt as to there being a contradiction in the evidence. And if we put in the place of one witness an instrument in writing, it cannot be said that this circumstance would remove the contradiction in the testimony. The same conflict would still exist.

These attempted explanations only go to prove the difficulties of the rule allowing these exceptions, in certain cases, and refusing them in others, when the statute has in terms excluded them in both. The object of the statute was to make written evidence the only testimony to prove certain contracts. And if the Courts, contrary to the words of the statute, can change the rule in one case, they can in all, and every written contract might be contradicted by parol proof.

In the case of *Stevens v. Cooper*, 1 Johns. Ch. 429, Chancellor KENT says:

"The plaintiffs in the original suit seek to avail themselves of a parol agreement, alleged to have been made between the parties to the mortgage, at the time it was executed, by [433] which * each lot was to be bound only for a ratable proportion of the mortgage debt. The mortgage in this, as in ordinary cases, bound every part and parcel of the mortgaged premises, for the entire debt, and if such a parol agreement as is charged, can be proved and set up, it goes to vary, essentially, the operation of the mortgage deed."

The parol evidence was not admitted, and the learned Chancellor makes these forcible remarks:

"The general rule is certainly not to be questioned or disturbed. It ought not to be a subject of discussion. It is as well grounded in reason and policy as it is in authority. Nor does this case come within any exception, admitted here, to the operation of the rule; for there is no allegation of fraud, mistake, or surprise, in making or executing the mortgage; and those, I believe, are the only cases in which parol evidence is admissible in this Court, against a contract in writing."

In the case of *Webb v. Rice* (1 Hill, 608), Mr. Justice BRONSON, in his able dissenting opinion, remarks:

"Although I may yield to the opinion of others, I never shall be reconciled to the doctrine that an absolute deed can, at law, be turned into a mortgage by parol evidence, nor that it can be done in a Court of Equity, except on the ground of fraud or mistake. It is contrary to a first principle in the law of evidence to allow a deed, or other written instrument, to be contradicted by parol proof."

The learned Judge quotes a passage from the opinion of Mr. Justice COWEN, in the case of *Swart v. Service* (21 Wend. 36), where the latter says:

"For one, I was always at a loss to see on what principle the doctrine could be rested, either at law or in equity, unless fraud or mistake was shown in obtaining an absolute deed, when it should have been a mortgage. In either case, the deed might be rectified in equity, and perhaps even at law, in this State where mortgages stand on the same footing in both Courts. Short of that, (fraud or mistake,) the evidence is a direct contradiction of the deed."

The general doctrine laid down by this Court, in the case of *Abell v. Calderwood* (4 Cal. 90), would seem to support the view we have taken. The learned Judge who delivered the opinion of the Court, said:

"The agreement being void, by the Statute of Frauds, Courts of Equity heretofore have, notwithstanding the statute, granted the relief sought in certain cases, where the refusal of it might enable one party to commit a fraud upon the other. In their abhorrence of fraud, these Courts have, in a material degree, abrogated the letter, and spirit, and intention, of the written law. In the effort to escape from an evil, they have unavoidably fallen into another; and for many years past, the best judicial minds *of common law countries have conceded [434] that the one they have fallen into is the greater evil of the two."

We think the strict rule the true one, and that in no case can parol evidence be introduced to vary or contradict the deed, except in cases of fraud, accident, or mistake, and then only upon a direct allegation of the defect in the creation of the instrument. In this case, the parties understood distinctly what was in the writing. They made it contain just what they intended it should contain.

Evans executed just such an instrument as he intended to execute, and no other. There was no mistake, fraud, or accident, in the creation of the instrument.

If the view we have taken be correct the plaintiff must rely solely upon the admissions in the answer. And this brings us to the second question.

The plaintiff alleges in his verified complaint that he loaned the defendant the money, and the defendant, in his sworn answer does not deny specifically, but admits he received the money, but insists the deed was to operate as a conditional sale, and if defendant repaid the money at the time when due, with

the three per cent. per month interest, then the premises were to be reconveyed; if not, the title should remain perfect in plaintiff. As stated by defendant in his answer, did the transaction amount to a mortgage?

In a note to 4 Kent, 148, it is said that the test of the distinction between a conditional sale and a mortgage, is this: "If the relation of debtor and creditor remains, and a debt still subsists, it is a mortgage, but if the debt be extinguished by the agreement of the parties, or the money advanced is not by way of loan, and the grantor has the privilege of refunding, if he pleases, by a given time, and thereby entitle himself to a reconveyance, it is a conditional sale."

In this case, the fact that the answer does not specifically deny that the money was loaned, but admits that interest was to be paid upon the amount, goes to show that it was a loan, and not a purchase. A conditional purchase puts the grantee into possession, and leaves him in the enjoyment of the rents and profits, with the privilege of re-purchase by the grantor, upon returning the purchase-money, or some specified amount. But when interest is to be paid, it is a very strong circumstance to prove that the transaction was a loan. The circumstance stated in the answer that unless the money should be returned, the property should remain that of the plaintiff, does not change the nature of the contract. This is the usual form of a mortgage. (6 Watts, 126; 2 Cow. 331, 332.)

If a mortgage at the beginning, the instrument always remains a mortgage. (Wright, 253, and authorities there cited.)

[435] *If, then, Evans had filed his bill to redeem, and Lee had admitted all that Evans now admits, would a Court of Equity have granted him relief? And if a Court would relieve Evans under such circumstances, would not the same justice be meted out to Lee? We think it should be so. The grantee should be relieved as well as the grantor under the same state of case. (9 Wheat. 495; 4 Seld. 416.)

In the case from Selden, the grantee, Hodges, was allowed to show that the instrument was intended as a mortgage.

The object of the statute was to prevent perjury in reference to sales and mortgages of lands; and for that reason required the evidence of such transactions to be in writing. The intent of the statute is fully carried out by excluding parol testimony. But where parties admit the real facts of the transaction in their pleadings, those admissions are to be taken as a modification of the instrument. (Story's E. J., 755.) Even a defeasance to the deed may be executed subsequently, and will relate back to the principal deed. (4 Kent, 144.)

For these reasons, the judgment of the Court below is reversed, and the Court will render a decree for the plaintiff.

PEOPLE v. BUTLER.

1 GRAND JURY, HOW LEGALLY CONSTITUTED.—Where a grand jury consisted of twenty-three persons, nine of whom were challenged for cause by a prisoner, and the charge was sustained by the Court, and nine jurors excluded from the investigation of the case, and an indictment was found by the remaining fourteen: *Held*, that the indictment was found by a legally constituted grand jury.

2 TRIAL.—EXAMINATION OF WITNESS.—Where the prosecuting attorney was allowed by the Court to ask a witness on a trial for murder, what was the business of the prisoner, under the objection of the latter, on the ground of irrelevancy: *Held*, that where the record did not contain all the evidence given, the question must be presumed to be relevant, as such might often be proper.

IDEM.—ANSWER OF WITNESS CONSTRUED.—Nor can the answer of the witness that the prisoner was a gambler, be considered as an injury to the prisoner, at a time when gambling was licensed by law.

IDEM.—DUTY OF PROSECUTING ATTORNEY.—Prosecuting attorneys, however, should do their duty faithfully, but no more. They should never act as employed counsel, nor take advantage of temporary public excitement against the prisoner, or of any prejudice against him, arising from any cause whatever.

3 HOMICIDE, WHAT PROVOCATION INSUFFICIENT.—No words of reproach, how grievous soever, are sufficient provocation to reduce the offense of an intentional homicide with a deadly weapon, from murder to manslaughter.

APPEAL from the District Court of the Fourteenth Judicial District, County of Nevada.

The prisoner was indicted by the grand jury of the county of Sierra, for the crime of murder, alleged to have been committed upon Robert Moffat, in September, 1855. The grand jury was composed of twenty-three persons, and nine of them challenged for cause by the prisoner, and the challenge [436] sustained, and the nine jurors thus challenged, were ordered by the Court of Sessions not to be present in the grand jury room, during the investigation of the case of the prisoner. The indictment was found by the remaining fourteen. A change of venue was had to the county of Nevada, where the defendant was tried and convicted before the District Court, and sentenced to be executed on the 9th day of October, 1857. From which judgment the defendant appealed.

The errors assigned, and the grounds upon which they are based, fully appear in the opinion of the Court.

Wm. M. Stewart and *A. A. Sargeant*, for Appellant.

After the exclusion of nine persons from the grand jury in the case of appellant, there remained but fourteen qualified grand jurors in said cause, which, appellant contends, was an illegal grand jury, and not competent to find any bill of indictment against him.

The statutes of this State direct that “where, of the persons summoned, not less than seventeen and not exceeding twenty-

1. Approved *People v. Gatewood*, 20 Cal. 148; *People v. Phelan*, Cal. Sup. Ct., April T., 1872, not reported.

2. Approved *People v. Brotherton*, 47 Cal. 405.

3. See *People v. Hurley*, ante 390.

three attend, they shall constitute the grand jury. If, of the persons summoned, less than seventeen attend, they shall be placed on the grand jury, and the Court shall order the sheriff to summon a sufficient number to complete the grand jury." (Comp. Laws, p. 354, Sec. 9.)

The language of the statute expressly holds that grand jury incomplete that is composed of less than seventeen—not less than seventeen shall constitute the grand jury. If less than seventeen attend, the sheriff must summon a sufficient number to "complete the grand jury." Then it must be incomplete with less than that number, and an illegal grand jury.

The next section of the statute (Sec. 10, Id.) requires that, if from a challenge to the panel, or to an individual grand juror, it becomes necessary, the sheriff shall summons a sufficient number of persons "to complete the grand jury."

When the grand jury is reduced below seventeen by individual challenge, it is as incomplete as though of the original number summoned, less than seventeen attend, and the sheriff must summons persons to complete it. By every intendment of the statute, such a grand jury is an illegal body, and its acts void. (See the case of *People v. Thurston*.)

So far as the appellant was concerned, there was a grand jury of fourteen empaneled.

He had a right to seventeen, and however legal the grand jury might have been in other cases, when his was called, its elements dissolved, and necessarily so, from the manner of its creation, and left with nine, a residuum of the authority of a grand jury.

[437] *It may be contended that in the case of the *People v. Roberts* (April Term, 1856), this Court passed upon this question, and decided it adverse to the propositions we have stated. An examination of the opinion in that case shows this to be erroneous.

This Court first passes upon the question of incompetency. In the case at bar, we raised no objection to the individual competency of the fourteen allowed to sit upon the jury, but to their collective sufficiency.

The Court next passes to the question of the necessity of the concurrence of seventeen in finding the bill of indictment, and correctly, as we believe, lays down the doctrine that the concurrence of twelve only is necessary.

We take it as evident from the foregoing, that objections based upon the fact, that after a legal grand jury has been constituted, some one or more of them absenting themselves from the jury-room will not vitiate the proceedings of the rest.

If seventeen qualified persons are empaneled in a given case, a temporary indisposition of one of them, or the fact appearing that one is a witness, and thus causing a less number to act, the indictment will be good if twelve concur in finding it. We do not take it for granted that the Court in fact, or by implication, did, or intended to make void the statute of the State, before

referred to, that provides that when from challenges to individual grand juries, less than seventeen qualified to sit remain, the sheriff shall summon persons to complete the grand jury. (Comp. Laws, 354.)

But in the case at bar, as we have shown, but fourteen grand jurors were empaneled, and all their proceedings, affecting the appellant, were void, *ab initio*.

The second point of exception of the appellant is, briefly, that the prosecution improperly put in issue his character upon the trial, he having called no witness and asked no witness any question authorizing such an act.

The prosecution introduced a witness named Rufus Kibbie, "and after having asked several questions, which were answered by the witness, asked the witness what was Mr. Butler's business at Downieville?"

This was excepted to, and the exception overruled, and was answered as follows: "I do not know that Butler was employed particularly in any business; all that I ever saw him at was gambling."

We contend that such questioning and such testimony was not only grossly irrelevant, but a positive injustice to the appellant—calculated to draw the minds of the jury from the real issue, and create prejudice against him in the minds of the jury. The mere statement of the question about Mr. Butler's business suggests many reasons why it should have been ruled out of the Court.

*In any view of the case, it did not affect the question [438] of his guilt, as charged. Whether he was an actual or reputed gambler—whether he was a preacher or a knave—whatever might have been his profession, political character, or religion, while he did not put these things in issue, the prosecution, by all precedent and authority, could not do so, and should have been rebuked by the Court below for attempting it.

This view of the law is not novel; it breathes from every page of the authorities. (See 24 Wendell, in *The People v. White*; 2 Mass. 318; 14 Wend. 654.)

Roscoe says: "The prosecutor cannot enter into evidence of the defendant's bad character, unless the latter enable him to do so by calling witnesses to his good character; and even then the prosecutor cannot examine as to particular facts." (Roscoe Cr. L. 97.)

Upon this point, permit us further to direct the attention of the Court to the following authorities: *Com. v. Hardy*, 2 Mass. 317; *People v. Akley*, 9 Barb. 609; *State v. O'Neal*, 7 Ire. 251; *Com. v. Webster*, 5 Cush. 325.

The next question that arises is, will the Court take judicial cognizance, that gambling is an offense and immoral. In the case of *People v. Raynes* (3 Cal. 366), the Court say: "that the statute re-enacts the common law in making this evil occupation a misdemeanor, punishable by fine and imprisonment, and the

license is proposed as a sort of compromise for the offense, doubtless with the hope of regulating and thereby diminishing the bad influence of a vice which it is impossible to suppress."

With reference to the third point, we thought the instruction at the time more rigorous than the case required, but do not wish to urge it upon the attention of this Court.

Wm. T. Wallace, Attorney-General, for the People.

The first error assigned by the prisoner is that inasmuch as his challenge to nine of the twenty-three grand jurors was sustained, and the nine directed by the Court of Sessions not to participate in finding the indictment that it left but fourteen grand jurors who could act in finding the indictment, and that fourteen is an insufficient number to find an indictment.

In the case of *The People v. Roberts* (6 Cal. 214), the question came before this Court, whether if there be a grand jury of seventeen, and one be absent, or incompetent, the finding of an indictment would be vitiated thereby—and it was determined that it would not.

The second supposed error consists in the fact, that the Court permitted the prosecution to prove the avocation or calling of the prisoner. And it is assumed here, by the prisoner's counsel, that this was done for the purpose of prejudicing the prisoner's case, by proving that he was a gambler. To my mind, [439] it does *not appear that the question was improper. It will be borne in mind, that the record does not purport to set out all the evidence in the case, but only the evidence upon certain points; now, if there was a question of identity of the prisoner involved in the case below, it was perfectly proper to prove the business which he followed, and any other similar circumstance, to point him out as the particular man charged with the crime. Other circumstances might be suggested in which such evidence would be proper, and in which the Court would have committed an error, if it did not permit the question to be asked—and so far as the bill of exceptions shows, any one of these hypotheses may have existed in the case. In this view, the rule so often repeated in this Court that all intendments are in favor of the correctness of the proceedings below, applies with force. If, in one view of the case, the evidence was admissible and proper, the Court will intend that it was properly admitted, unless the bill of exceptions excludes this conclusion. In the case of *Rogers v. Hall* (3 Scam. 6), the Supreme Court of Illinois say that a bill of exceptions is to be esteemed as a pleading of the party offering it, and if liable to the charge of ambiguity, uncertainty, or omission, it ought, like any other pleading, to be continued against the party who prepared it.

The third supposed error assigned, is found in the instruction of the Court, to the effect that mere words of reproach, without further cause or provocation, will not reduce the crime from murder to manslaughter, where the killing was done with a deadly weapon, such as a pistol, as in this case. I apprehend,

that if there be one question which is settled in criminal jurisprudence, it is this. I do not suppose that an authority of note can be produced against the ruling of the Court. (Wharton's Crim. Law, p. 368.)

BURNETT, J., after stating the facts, delivered the opinion of the Court—FIELD, J., concurring.

The first ground of error alleged by the learned counsel of the prisoner, is, that the grand jury finding the indictment was not legally constituted, there being only fourteen present at, and participating in, the investigation of the particular case. But this objection was not well taken, as has already been decided by this Court, in the case of *People v. Roberts*, 6 Cal. 214. The statute requires the concurrence of twelve grand jurors to find an indictment; and when that concurrence is had, it is not perceived how the prisoner can be injured by the absence of the others. In this case the grand jury consisted of the proper number, but nine of them were excluded from participating in the proceedings in reference to this particular case.

The next ground taken by the counsel of the prisoner, is that the District Court erred in permitting the district-attorney to *ask a witness for the prosecution, this question, [440] namely: "What was Mr. Butler's business at Downieville?" This question was objected to on the ground of irrelevancy, the objection was overruled and the prisoner excepted. The witness then answered, "I do not know that Butler was employed particularly in any business; all that I ever saw him at, was gambling."

The record in this case does not contain all the evidence given at the trial. We must, therefore, presume that the state of the testimony was such as to authorize the question, if admissible at all under any state of case. Several witnesses had been examined by the prosecution, and what was the testimony given by them, the bill of exceptions does not state. If, therefore, we can conceive of a state of case when such a question would be proper, we are compelled to presume that it existed in this case.

At the time the question was put, the Court could not know what would be the answer of the witness. The question might have been material for the purpose of identifying the prisoner; or of testing the memory of the witness, as to whether he knew the prisoner. There are many states of cases in which the question might have been relevant and proper.

But we cannot perceive that any injury could result from the question, if proper instructions were given by the Court, which we must presume was done. At the time the alleged murder was committed, there was no statute in force making gambling a criminal offense; but there was a statute authorizing gaming as a lawful business. (Com. L. 826.)

There was, then, nothing criminal in the eye of the law, as it then existed, in the practice of gaming.

If then, it was necessary to put such a question to the witness under a state of the case we must presume to have existed, the danger of injury to the prisoner was too remote to justify us in reversing the judgment of the Court below upon this ground. Every prisoner is entitled to a fair trial before an unprejudiced jury; and Courts should be very careful to exclude all irrelevant questions that might prejudice the prisoner. But it is impossible for the law to exclude every question that might prejudice some minds, without entirely defeating the ends of justice. In putting questions of doubtful character the district-attorney should be required by the Court to state, in advance, the purpose for which the evidence is offered. The State never asks anything but justice. On the part of the State the prosecution is but a fair and just inquiry into the guilt or innocence of the accused. She can have no interest in convicting the innocent or in releasing the guilty. She stands perfectly impartial as between the community and the individual. Prosecuting attorneys should therefore, do their duty faithfully, but no more. They should never act as employed counsel. No advantage should be taken of temporary public excitement [441] against the prisoner, or of any prejudice against him arising from any cause whatever. And if such attempts are made, the Court before whom the prisoner is tried, should put a stop to them.

But in this case there is nothing before us to show that the question was improper when put. Our duty is "to disregard technicalities, and to determine from the whole case whether the prisoner has had a fair trial, and the judgment is correct." (*People v. Moore*, ante 90.)

The last error assigned by the counsel of the prisoner is that the Court erred in giving the following instructions:

"Again, mere words of reproach, without further cause or provocation, will not mitigate an intentional homicide committed with a deadly weapon, so as to reduce it to manslaughter.

"It therefore follows that if the prisoner at the bar intentionally killed Moffat by shooting him with a pistol, intending to take his life, and that there was no injury committed or attempted to be committed by Moffat, and no provocation except by the use of words, then the jury should find the prisoner guilty of murder."

The language used by Moffat was this, as stated in the bill of exceptions: "I want nothing to do with you;" "I do not think it any honor for a man to have anything to do with you;" or, "I want nothing to say to you, or any of your kind," or "I want nothing to do with you, I know you of old."

This language, the counsel of prisoner insisted, at the trial, was "sufficient to excite an irresistible passion in a reasonable person, and that if the jury should be of that opinion, they could not find the defendant guilty of a higher crime than manslaughter."

It is but justice to the learned counsel for the prisoner to say,

that they do not urge the point upon this Court. But it is deemed proper, as the point is made, though not urged, to say a few words respecting it.

All the authorities upon criminal law are against the position. The rule upon this subject is well stated in Wharton's Criminal Law, p. 368, where it is said:

"Words of reproach, how grievous soever, are not provocation sufficient to free the party killing from the guilt of murder; nor are indecent, provoking actions, or gestures expressive of contempt or reproach, without an assault upon the person."

Every State, and every community, has a right to adopt the means necessary to its own protection, and what those means are, the society must judge. The law of self-protection is as applicable to communities as to individuals. Communities are but corporations, or artificial beings, capable of united action through proper organs. Every member of society forms a part of this artificial being, and the State, therefore, has the greatest interest in preserving the lives of its people. The security, power, and greatness, of a State, depend upon [442] the number and character of its population. The State, and each member of the body politic, have a reciprocal interest in the welfare of each other, and owe certain mutual duties and obligations to each.

From these positions, it results legitimately, that no civilized State can adopt a steady system of law that will permit the destruction of its people for light and trivial causes. As the State has an interest in every one, and every one owes a duty to the State, no man has the right to destroy himself, or to render himself incapable of performing his duty to his country. When he does so, he commits a great moral and political wrong, which no system of enlightened jurisprudence can sanction or approve. If a man was permitted to mutilate his person, or cripple himself, so that he could not perform the duties of a good citizen in time of peace, or defend his country in time of war, then the State would be compelled to protect him, while he could render no service in return. And it was long ago held in the case of a man who cut off his arm to avoid entering the army, that he was guilty of an offense. And what a man has no right to do himself, others have no right to do for him, except in cases of *necessary self-defense*.

As the State must look to the protection and preservation of its citizens, it cannot accommodate its permanent system of laws to the peculiar pride, or views, of individuals. And if we take a just and rational view of the subject, there can be nothing in mere words, or gestures, that should "excite an irresistible passion in a reasonable person."

If untrue, they cannot alter the fact. The truth still remains unchanged. But if true, the party has no right to complain. It is enough for a just man to do right himself. That is his business. That is a matter within his own control. If others do him injustice in words, that is their fault, not his. There are,

and must be, good and intelligent men enough in every community to do him justice, sooner or later. All that is required is time and patience. A reasonable man ought to have patience and forbearance. But suppose the law should justify the destruction of human life for mere words, what must be the practical result of such a theory? Where would it end? How would justice be practically administered?

Under such a theory, it would become necessary to establish, by judicial decision, what were, and what were not, words of insult and reproach. If this were not done, no man could tell, in advance, what he might say himself, or for what he might kill another man for saying; and the Court would not only have to do this, but they would have to permit the truth or falsity of the words to be shown. It would not do to allow a man to be killed simply because he told the prisoner the truth. In criminal prosecutions for libel, our Constitution allows the truth [443] to be given in evidence for the defendant. And in all actions for libel, or slander, the defendant may justify by proving the truth of the words written or spoken. To tell the truth would hardly be considered a crime in our country. And if we look simply to the effect that words are apt to have upon men, we should find that when true, they generally produce the most "irresistible passion." The actual effect is generally in proportion to the true elements of truth in fact, and the character of the charge made. And the character of the charge made will depend upon the peculiar views of the person accused.

Whatever may be the views of particular individuals upon this question, it is apprehended that no such a theory ever could be tolerated in any system of law. There is no anticipating the practical effects it would have upon the welfare of society.

After considering the whole case of the prisoner, we think there is no sufficient cause for reversing the judgment of the Court below, which is, therefore, affirmed.

WHITE ET AL. v. TODD'S VALLEY WATER COMPANY.

1 WATER RIGHTS, FIRST APPROPRIATOR.—Where the defendants had constructed a ditch for mining purposes, and the plaintiffs had subsequently constructed another, taking its water from the same stream, and brought suit for damages sustained by reason of an enlargement of defendant's ditch, made after the commencement of plaintiffs' ditch, causing a diversion of a greater quantity of water; and praying for an injunction: *Held*, that defendants are not limited to the quantity of water turned into their ditch in the first instance, unless by the general plan, size, and grade, of the ditch, it was not capable of carrying more water than was then diverted.

2 IDEM.—TIME FOR CONSTRUCTION OF DITCH.—If, by reason of obstructions in the ditch, or irregularity in the grade at that time, it was not capable of diverting as much water as its general size would indicate, the defend-

1. Cited *Butte Canal & D. Co. v. Vaughn*, 11 Cal. 163.

2. Cited *N. C. & S. C. Co. v. Kidd*, 31 Cal. 814.

ants would have a reasonable time to adjust the grade and remove such obstructions, and then fill the ditch to its capacity.

¹ *IDEM.*—But if they continued to divert only the original quantity of water long enough to indicate that they only intended to divert that amount, or failed for an unreasonable length of time to remove the obstructions or adjust the grade, they would be limited to the amount thus diverted, and plaintiffs would be entitled to the residue.

APPEAL—CONFLICTING TESTIMONY.—When the testimony is conflicting, this Court will not disturb a verdict.

APPEAL from the District Court of the Eleventh Judicial District, County of Placer.

The defendants, 'a corporation for mining purposes, constructed a ditch in 1851, taking water from the Volcano Canon. In 1852, the plaintiffs, or those under whom they claim, constructed their ditch, tapping the same stream at a point a short distance below. In their complaint, the plaintiffs allege that the ditch of defendants had been so enlarged since the date of the commencement of plaintiffs' ditch, as to increase the volume of water running therein, to the injury of the plaintiffs. This allegation is denied in the answer. Upon the trial in the Court *below, the jury rendered a general verdict for de- [444] fendants. The plaintiffs moved for a new trial, which being overruled, they appealed to this Court.

The grounds of error assigned appear in the opinion of the Court.

Tuttle & Myers, for Appellants.

Hale & Hillyer, for Respondents.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., and FIELD, J., concurring.

There are two errors assigned by the plaintiffs:

1. That the verdict was against the evidence.
2. That the Court erred in giving and refusing instructions.

In reference to the fact as to whether the ditch of defendants had been enlarged so as to increase the flow of the water, the testimony was conflicting. The evidence fills some fifty-two pages of the transcript, and there was ample room allowed for the exercise of the discretion of the jury. It would be exceedingly difficult for any one to come to a satisfactory conclusion as to the real state of the case. And this uncertainty arises from the nature of the subject-matter, and the want of exact estimates at the time. We therefore cannot disturb the verdict upon the first ground assigned.

On the trial, the Court gave this instruction: "In determining the quantity of water in the canon, appropriated by defendants at the time of the construction of their ditch, which is conceded to have been constructed prior to that of plaintiffs', you will ascertain their intentions from their acts, the manner in

1. Cited *N. C. & S. C. Co. v. Kidd*, 37 Cal. 314.

which their ditch was constructed, the plan of the work, the general size, etc.

"They would not be limited to the quantity they have turned into their ditch in the first instance, unless by the general plan, size, and grade, of the ditch, it was not capable of carrying more water than was then diverted.

"If, by reason of boulders or stones in the sides and bottom of the ditch, or irregularity in the grade at that time, it was not capable of conveying as much water as its general size would indicate, the defendants would have a reasonable time to adjust the grade and remove such obstructions, and then fill the ditch to its capacity. But if they continued to divert the quantity only that they originally turned into their ditch a sufficient length of time to indicate that they only intended to divert that amount, or failed for an unreasonable length of time to remove such obstructions or adjust the grade of their ditch, they would be limited to the amount thus directed, and the plaintiffs would be entitled to the residue."

[445] *The plaintiffs excepted to the giving of this instruction, and offered the following, which the Court refused to give, and the plaintiffs excepted :

"What amount of water of Volcano Cañon was in the possession, or actually appropriated by defendants or those under whom they claim, at the time of the completion of plaintiffs' ditch, and the actual appropriation of the waters of said cañon by plaintiffs, or those under whom they claim."

We think the instruction given by the Court was correct, and entirely applicable to the state of facts proved before the jury. And it follows that if the Court was correct in giving the instructions, the refusal to give the one offered by plaintiffs was no error.

Judgment-affirmed.

SWIFT v. MUYGRIDGE' ET AL.

FINDINGS, WHEN NOT NECESSARY.—There is no necessity of a finding as to a fact admitted by the pleadings. A finding is only required when the allegation of a material fact in the complaint is controverted by the answer, so as to raise an issue.

1 FINDINGS MUST SUPPORT JUDGMENT. — The findings of a Court, like a special verdict of a jury, must, taken in connection with the pleadings, support the judgment.

APPEAL from the District Court of the Fourth Judicial District.

The opinion of the Court contains a full statement of the case.

Harmon & Labatt, for Appellant.

Pixley & Smith, for Respondent.

FIELD, J., delivered the opinion of the Court—TERRY, C. J., and BURNETT, J., concurring.

This was an action upon an undertaking executed by the defendants to release property attached in a suit in a Justice's Court, in which the plaintiff had judgment. The action was tried by the Court, and among its findings of fact there is none as to the release of the property attached and its delivery to the defendant in the attachment suit; and this omission is now urged by the appellant as fatal to the judgment. The position is not tenable. The release of the property by the constable, and its surrender to the defendant in that suit, are distinctly alleged in the complaint, and admitted in the answer. There can be no necessity of a finding as to a fact admitted by the pleadings. The finding is required only when an allegation of a material fact in the complaint is controverted by the answer, so as to *raise an issue. The findings of fact by the Court are [446] like a special verdict of a jury. They must be taken in connection with the pleadings to support the judgment.

Judgment affirmed.

GINICA v. ATWOOD.

1 REPLEVIN BOND, LIABILITY OF SURETIES ON.—Where the plaintiff in replevin gives the statutory undertaking, and takes possession of the property in suit, and is afterwards nonsuited, and judgment entered against him for the return of the property and for costs: *Held*, that his sureties are liable for damages sustained by defendant, by reason of a failure to return the goods, but not for damages for the original taking and detention, the value of the goods not having been found by the jury.

IDEM.—STATUTE CONSTRUED.—Section one hundred and seventy-seven of the Practice Act applies only where the issues of the case have been submitted and passed on by the jury, and not to a case of judgment of nonsuit. The decision in *Nickerson v. Challerton*, also, only applies to cases submitted to a jury.

IDEM.—NONSUIT, EFFECT OF.—The facts which upon a trial by jury would have been found in the original replevin suit, are, by a nonsuit therein, left to the jury called in the suit on the undertaking, so far as the conditions of the undertaking will authorize an inquiry into them.

APPEAL from the District Court of the Fifth Judicial District, County of Calaveras.

This is an action upon an undertaking given by the defendants, under section one hundred and two of the Practice Act, to authorize the Sheriff to take possession of certain personal property claimed in a replevin suit brought by the defendant Atwood, against the plaintiff. In the replevin suit the plaintiff was nonsuited, and judgment for the return of the property and costs was entered. The value of the property taken was not assessed by the jury. Upon the writ issued on the judgment, only a portion of the property was returned, and to recover damages for a failure to return the balance, and also damages for the original

1. Cited *Mills v. Gleason*, 21 Cal. 279. Commented on, *Clary v. Eolland*, 24 Cal. 180.

taking and detention of the property, this suit is instituted. To the complaint a demurrer was interposed, the point of which is that the value of the property was not ascertained by the jury.

The Court below sustained the demurrer, and gave judgment for defendant. Plaintiff appealed.

Robinson & Beatty, for Appellants.

In the case of *Nickerson v. Chatterton & Waters*, the Court seem to raise a question as to whether there can be a recovery on the plaintiff's undertaking in a case of this kind, where the defendant fails to have the value of the property of which he has been deprived by the plaintiff, assessed by the jury which tries the case.

In this case, a nonsuit was sustained, and, consequently, [447] the *case was withdrawn entirely from the jury; being withdrawn entirely from the jury, they could not find the value. The defendant in the original action could not, of course, (without a violation of every principle of justice and common sense), lose his remedy on the undertaking of plaintiff, because the plaintiff failed to make out a *prima facie* case, and was nonsuited.

One of the undertakings of sureties is that they will be responsible for return of the property, if return be adjudged.

In this case, a return of all the property is adjudged; if only part is returned, the sureties become bound for the value of that which is not returned, if the same be less than the penalty of the undertaking.

But the fact that plaintiff claims a greater amount in damages, makes no difference. The Court will, at the proper time, instruct the jury as to the measure of damages. But even if the complaint were defective in that point, the case must be sent back, and the plaintiff would have leave to amend his complaint.

William Higley, for Respondents.

The complaint in this action claims to recover the sum of six hundred dollars damages for value of property unreturned, and other six hundred dollars damages, suffered by the detention of the property.

To this complaint the respondents demurred. The Court below sustained the demurrer, and gave judgment for defendants.

The respondents claim the judgment rendered by the Court below in this action to be correct, and that it should be affirmed for the following reasons:

1. No sum was recovered against Atwood, as plaintiff, in the first action, for the recovery of which this action was brought. (Pr. Act, Sec. 102.)

2. This action cannot be maintained against the sureties in the bond or undertaking for a sum uncertain, or not ascertained in the previous action. (Prac. Act, Sec. 102.)

3. To bind sureties, and render them liable in this action, the judgment in the previous action should be in the alternative for the return of the property. Also, the amount of damages for the taking and detention of the same. (Pr. Act, Secs. 177, 200 and subdivision fourth of Pr. Act, Sec. 210.)

4. The Court is referred to one of its decisions. The case of *Nickerson v. Chatterton* (7 Cal. 568).

The language of the Court in that case embraces a logical deduction from the sections of the Practice Act above referred to, and conclusive as to the kind of judgment that should be obtained in the first instance, in order that the sureties in the bond or undertaking may be prosecuted, together with the principal, successfully upon the same in another action, and that if such a judgment be not obtained in the first instance, [448] the remedy upon the bond or undertaking is lost.

FIELD, J., after stating the facts, delivered the opinion of the Court—TERRY, C. J., and BURNETT, J., concurring.

The undertaking was, among other things, for the return of the property taken in the original replevin-suit, if a return should be adjudged by the Court. Such return was adjudged, and yet such return was not fully, but only partially made. To the extent, then, in which the conditions of the undertaking have not been complied with, the defendants are liable. It is for damages arising from a failure to return the property that the action will lie, not for damages for the original taking and detention; these latter should have been found in the replevin-suit; not having been so, they cannot be recovered of the sureties. The undertaking was for the payment of such sum as should for any cause be recovered against the plaintiff in that suit; no sum beyond the costs was recovered, and it follows that the liability of the sureties is limited to that extent, and such damages as may have arisen from a failure to return the entire property. Section one hundred and seventy-seven of the Practice Act applies only where the issues in the case have been submitted to and passed upon by the jury. It does not apply to a case of a judgment of nonsuit. The decision of this Court in *Nickerson v. Chatterton* (7 Cal. 568), also only applies to cases which have been submitted to a jury. The present case is like a judgment upon a discontinuance, in which no jury is called. The facts which upon a trial by a jury would have been found in the original replevin-suit, are by such judgment left to the determination of the jury called in the suit on the undertaking, so far as the conditions of the undertaking will authorize an inquiry into them. It follows that the demurrer should have been overruled.

Judgment reversed, and cause remanded.

[449]

KANE ET AL v. COOK.

JUDGMENT, ON CONSTRUCTIVE SERVICE OF PROCESS.—A judgment obtained by publication of summons against a defendant then out of the State in which the judgment is rendered, though it may be enforced against his property in that State, has no binding force *in personam*, and is a mere nullity when attempted to be enforced in another State.

IDEM.—**HOW FAR INEFFECTUAL.**—As a recovery cannot be had upon such a judgment in another State, it is equally unavailing when offered in support of a plea of former recovery in an action upon the original demand.

IDEM.—**VALIDITY, ON WHAT DEPENDS.**—To hold otherwise would be to hold that the validity of the judgment depends not upon the jurisdiction of the Court, but upon the manner in which it is pleaded.

CONSIGNEE, LIABILITY OF.—The liability of a consignee to his principal, for the proceeds of sales made, accrues, in the absence of original instructions to remit proceeds on sale, on demand, or instructions to remit, and not upon receipt of proceeds by the consignee.

IDEM.—**WHEN IT ATTACHES.**—And where instructions to remit are originally given, but the consignee forwards no account of sales, the right of action of the principal only accrues upon his knowledge of the sales, and of receipt of the proceeds by the consignee.

IDEM.—Nor does the fact that the principal had, at an earlier period, commenced an action in another State, where he resided, against the consignee to recover the proceeds, averring in his complaint, upon information and belief that a sale had been made, fix that as the time when the liability accrued.

IDEM.—**DUTY OF CONSIGNEE.**—It was the duty of the consignee not only to inform his principal of the sales, but to remit the proceeds. His neglect not only deprived his principal of his funds, but kept him in ignorance of his rights.

LIMITATION OF ACTION AGAINST CONSIGNEE.—To hold that the Statute of Limitations ran against the principal under such circumstances, would be to permit the consignee to take advantage of his own wrong, and to sustain a defense, of which, in conscience, he ought not to be permitted to avail himself.

STATUTE OF LIMITATIONS, CONSTRUCTION OF.—Statutes of Limitations are intended to prevent the assertion of stale claims, which it may be difficult, or impossible, to defeat by furnishing the requisite proof, owing to the lapse of time; and also proceeding upon the presumption of payment. They are not intended to protect a party who, by a fraudulent concealment, has delayed the assertion of a right.

APPEAL from the District Court of the Fourth Judicial District.

In January, 1853, the plaintiffs, who are residents of New York, consigned certain goods to the defendant, who is a resident of this State, with instructions that the same should not be sold at less than invoice prices. The goods were received by the defendant at San Francisco, June 20, 1853, and were sold the same day, but no account of sales was ever rendered to the plaintiffs. In October following, the plaintiffs instituted suit in the Supreme Court of New York to recover the proceeds of the consignment, made publication of the summons therein, and obtained judgment, no part of which has ever been paid. In July, 1856, a demand was made upon the defendant at San Francisco, and upon his refusal to pay over the proceeds, this

suit was commenced. To the complaint, which alleges the consignment, receipt, and sale of the goods, and a refusal of the defendant to account and pay over the proceeds, the defendant *pleads the former recovery in New York, and [450] the Statute of Limitation.

The invoice of goods, belonging one third to plaintiffs and one third to defendant, were shipped to the defendant, with instructions to remit proceeds of the portion belonging to plaintiffs.

The defendant never rendered any account of sales to the plaintiffs, and there is nothing to show that they ever had any knowledge of the sales until a short time previous to the commencement of this action. The plaintiffs' complaint in the action brought in New York, alleges a sale upon information and belief; and contains no positive averment of the fact.

The case was tried by the Court below, without the intervention of a jury, and the Court, after finding the facts as above, gave judgment in favor of the plaintiffs for the amount claimed.

Motion for a new trial was made and overruled, and defendant appealed.

E. D. Sawyer, for Appellant.

1. The complaint does not state facts sufficient to constitute a cause of action.

This action is upon a contract, made and entered into in New York, January 20, 1853. And section one of an Act supplementary to an Act defining the time of commencing civil actions in certain cases, passed May 4, 1852, is pleaded in abatement to the action.

The statute referred to is as follows:

"Section one.—An action upon any judgment, contract, obligation, or liability, for the payment of money or damages obtained, executed, or made out of this State, can only be commenced within two years from the time the cause of action has accrued or shall accrue."

That the defendant sold and disposed of all of said goods in the city of San Francisco, June—, A. D. 1853.

The contract was made in New York, and the right of action accrued to the plaintiffs so soon as there was a breach of the contract on the part of defendant, or a sale of the goods.

By the English authorities, it is well settled that *in assumpsit*, the Statute of Limitation begins to run not from the time when the damage results from the breach of the promise, but the time when the breach of promise takes place. (*Short v. McCarthy*, 3 B. & A. 626; *Battley v. Faulkner*, Id. 288; *Brown v. Howard*, 2 B. & B. 73.) In this case, the plaintiff employed, in 1808, defendant, to lay out money for him in the purchase of an annuity, and discovered in February, 1814, that the security was void, within the defendant's own knowledge, at the time of the purchase. In 1820, plaintiff sued defendant *in assumpsit*, for breach of an implied contract, to provide good security: *Held*, by PARK, J.: "The only question is, when the cause of

[451] action accrued, for *the statute there attached. I think the cause of action accrued the moment the defendant failed to perform that which he agreed to do.

"Whatever the form of action, the breach of duty is substantially the cause of action, and the statute is a bar to the original cause of action, and all the consequential damages resulting from it.

"In *assumpsit*, it is clear that if the breach of duty was beyond the six years, the Statute of Limitation is a bar, though the damage was within the time prescribed." (*Howell v. Young*, 2 Car. & P. 550, and cases there cited.)

To apply the foregoing principles to this case, the right of action accrued to the plaintiffs at the happening of an event, to wit: the sale of the goods, which was in June, 1853; the defendant did not remit the money; then was the breach of duty, and then the right of action accrued.

2. That the decision is against law.

The defendant further plead in his answer, the Statute of Limitation, as well as a former adjudication of the same subject-matter between the same parties. All that has been said relative to the complaint not stating facts sufficient to constitute a cause of action, is applicable under this division of the argument.

The record shows that the contract was made in New York. That the defendant was to sell the goods belonging to Kane & Co., in San Francisco, for their benefit, and send them the money.

Then there was no cause for a demand, because the amount due plaintiffs was determined, and the time when it should be remitted. If the Court should think a demand was necessary for the Statute of Limitation to commence, then the appellant says a demand was made previous to October 7, 1853.

The action was not commenced here for more than two years thereafter, hence the right of action here was barred by our Statute of Limitation. (Com. Laws, 819.)

The same subject-matter had been heretofore adjudicated between the same parties, in the Supreme Court of the State of New York, and the plaintiffs should have brought their action upon the judgment there obtained.

That judgment is still in full force and effect in that State; and by the first section of the fourth article of the Constitution of the United States, and the act of Congress of May 26, 1790, passed in pursuance thereof, gives that judgment, duly authenticated, the same faith and credit in this State as in the State where it was obtained. If it is conclusive between the parties in New York, it is equally conclusive here. (Story Com. Con., Vol. 3, Sec. 1313.)

R. P. Clement, for Respondents.

The defendant offered in evidence, as a bar to this action, and as a proof of a former adjudication of the subject-matter [452] *suit, an exemplified copy of the record of a judgment

of this obtained in the New York Supreme Court, by Charles I. Kane and Henry P. Hubbell, against William Cook, January 18, 1854, by publication of summons, and without any personal service, or any appearance of the defendant, either in person or by attorney—the defendant being, at the time, a non-resident of the State of New York, and a resident of the State of California—all of which facts appeared from the record.

The transcript was read in evidence, under objections from plaintiffs' counsel, that such record was not evidence, nor any bar to this action, for want of jurisdiction in the Court of the person of the defendant. No other evidence was offered on the part of the defendant.

It was at first strongly urged, by defendant's counsel, that the New York judgment was proof of a former adjudication of the subject-matter of this suit, and a consequent bar to this action; but this position was finally abandoned, and he then contended that the New York record was proof of a demand more than two years before the commencement of this suit.

The defendant now appeals to this Court, and asks that the judgment of the Superior Court be reversed, and a judgment be entered for the defendant, on the following grounds:

1. Because the complaint does not state facts sufficient to constitute a cause of action.

2. That the decision is against law.

The first objection of counsel, seems to be based entirely on the supposition that the complaint shows a case within the Statute of Limitations of this State.

It is a sufficient answer to this, that the Statute of Limitations must be pleaded, even when the cause of action appears on the face of the complaint to be out of time. (Angel on Limitations, p. 468, and cases cited.) But the complaint, in this case, shows no such case as counsel has supposed.

The action is for money received by the defendant, for the use of the plaintiffs, as their factor and agent, and it was necessary for us to allege and prove a demand in order to entitle us to recover.

A factor is not liable until a demand, and we had no cause of action against the defendant until a demand, and a refusal to pay. The complaint in this case alleges a demand, but it does not allege the time, and it was not necessary that it should—it must be presumed to be in time. The defendant's liability commenced at the time of the demand and refusal to pay, and not at the time of the sale, as counsel claims.

A factor or agent is not liable, until a demand or instructions to remit. (See *Ferris v. Parris*, 10 John. 275; *Baird v. Walker*, 12 Barb. 301.) In this last case, "the goods were left for sale, in September, 1838, and the attachment was not sued out *until December, 1847, more than nine years after, and [453] no demand was made until July, 1847; and, until that date, there was no cause of action, and the Statute of Limitation did not apply.

In the case of *Cooley v. Betts*, 24 Wend. 204, the same thing is held, and Chief Justice Bronson says that, in that case, the defendant cannot recover without showing a demand, or instruction to remit.

The case of *Little v. Blunt* 9 Pick., 487, and the case of *Codman v. Rogers*, 10 Pick. 11, are authorities to the point, that when a demand is necessary, the statute does not begin to run until a demand is made. In the case of *Clark v. Moody et al.*, 17 Mass. 145, the same thing is held. It is held further in this case, "that an agent ought not be held to remit at his own risk, and he cannot remit at the risk of his principal, unless in compliance with instructions."

The case of *Clark v. Moody* is quoted at length by Mr. Angell, in his work on limitations, and adopted by him as a true exposition of the law in such cases. The case fully recognizes the necessity of a demand in just such cases as the one at bar.

There is no evidence in this case of any demand prior to the 18th day of July, 1856, and there was no demand, nor any instruction to remit, before that time.

The testimony of the only witness in this case shows an agreement, on the part of the defendant, to sell the goods of the plaintiffs in San Francisco, for their benefit, and send them the money. And defendant's counsel concludes that the defendant was to remit, without any instructions as to how. But no such conclusion can be drawn from the testimony. The only inference to be drawn from the testimony is, that the defendant was to send them the money as they might direct. This is the natural inference, and such is the legal presumption. The evidence shows no right on the part of the defendant to remit without instructions or a demand, and it was his duty to await instructions or a demand; he could not have done otherwise, except at his own risk.

But appellant says, that if this Court is of opinion that a demand was necessary in this case, that then a demand is proved by the New York record to have been made October 7th, 1853.

To this I reply, that the New York record proves no such thing. The statement of the complaint in that case is, that the plaintiffs have been informed by their agent in San Francisco, and verily believe the same to be true, that the defendant has sold and disposed of the said goods and merchandise, collected and received the money therefor, and has and still refuses to pay over what moneys he has received, or to account in any manner therefor.

The statement is made upon information received from a third party; and as proof would be no evidence of a fact, and [454] as an admission it amounts to nothing, because it admits no fact. The counsel is not serious in claiming that such a statement is to be received against a party as any evidence of a fact, or as an admission of a fact. Hearsay admissions by a party amount to no more than hearsay testimony by a witness, and neither are entitled to any credit.

If a demand had been made by an agent of the plaintiffs, the defendant would scarcely have neglected to prove so important a fact; he must have known by whom the demand, if any, was made, and might have procured his testimony.

If the plaintiffs had relied upon the New York record as evidence of a demand, they must have failed; and if insufficient to prove a demand for the plaintiffs, it must be equally insufficient when used by the defendant for the same purpose.

The New York judgment is no evidence of any fact, not even of a demand, and is no merger of the original cause of action, and no bar to this action for want of jurisdiction in the Court in which it was obtained, of the person of the defendant.

Such a judgment is a mere nullity (*Bissell v. Briggs*, 9 Mass. 462; *Starbuck v. Murray*, 5 Wend. 156; *Holbrook v. Murry*, Id. 162; *Shumway v. Stillman*, 6 Wend. 453; *Kilburn v. Woodworth*, 5 John. 37; *Robinson v. Ex. Ward*, 8 John. 86; *Fenton v. Randall*, Id. 194; *Story's Conflict of Laws*, 1,002 note and cases, secs. 507, 549; *Hare & Wallace's Notes to cases of Mills v. Durye*, and *McElmoyer v. Cohen*, 2 Amer. Lead. cas. 719; *Whither v. Wendell*, 7 N. H. 257, and *Rangely v. Webster*, 11 N. H. 299.) These last two cases are express, that such a judgment is no bar to an action on the original cause of action.

E. D. Sawyer, in reply.

The counsel for respondent claims that a factor is not liable until a demand. Such is the general rule of law, to which there is exception, and this case falls within the exception. The law does not demand a vain or foolish thing to be done before a party can pursue his rights. There is reason in making a demand before suit when goods have been consigned to an agent for sale, the accounts are unadjusted, and the commissions not agreed upon. Yet, when all of this has been done, or a particular sum is to be remitted for goods, by the agent to the principal, the rule fails, because the reason of the rule has failed.

The case of *Ferris v. Parris et al.*, 10 Johns. 284, does not go to show a demand always necessary, only that a demand was necessary in that particular case, which is not this case.

The case of *Baire v. Walker*, (12 Penn. St.) is one under the general rule. In that case there never had been a settlement of accounts, the goods were merely left for sale, and until a demand for the goods or the proceeds thereof, there was no default on the part of the agent.

*I agree with the counsel for respondents that the doctrine laid down in the case of *Little v. Blunt* (9 Piers. 490), is correct. It is there held: "An action accrues to a party whenever he has a right to commence it," and from that date the Statute of Limitation commences to run.

The counsel for respondents contends that the appellant was to pay on demand. I hold the record shows, "The goods were to be shipped together, all consigned to Cook, he being instructed and agreeing to sell the one third belonging to Kane

& Co., for their benefit, for a price not less than the invoice price, and to send them the money for the same."

The counsel further says there is no evidence of a demand prior to the 18th day of July, 1856. The commencement of the action by plaintiffs in New York, is itself a demand, which was in October 7, 1853.

FIELD, J., after stating the facts, delivered the opinion of the Court—TERRY, C. J., and BURNETT, J., concurring.

The judgment in New York, although recovered for the same cause, is not a bar; it was rendered without personal service on the defendant, or his appearance in the action. He was at the time in this State, and the Court, therefore, had no jurisdiction of his person. The clause of the Federal Constitution requiring full faith and credit to be given, in each State, to the records and judicial proceedings of every other State, applies to the records and proceedings of Courts, only so far as they have jurisdiction. But, in every particular in which they want jurisdiction, their judgments, when attempted to be enforced out of the State where rendered, are treated as mere nullities. In the present case, the judgment was sufficient to subject to its satisfaction, within New York, property of the defendant in that State. To that extent it would be held valid as a proceeding *in rem*; but it has no binding force in *personam*, for want of jurisdiction of the person. To the extent in which jurisdiction existed, will faith and credit be given to the judgment in this State, and no further. Thus, if personal property of the defendant had been sold under this judgment, in New York, and the purchaser had brought the property into this State, he would be protected against a claim of the defendant. The judgment, and sale thereunder, would sustain his title. But for all the purposes of establishing a personal claim against the defendant, it is a mere nullity, and it makes no difference whether valid, and in conformity with the course and practice of the Court where rendered, or otherwise.

In the leading case of *Bissel v. Briggs*, Chief Justice PARSONS, in rendering the decision of the Supreme Court of Massachusetts, says:

"And upon the same principle, if a Court of any State [456] should *render judgment against a man not within the State, nor bound by its laws, nor amenable to the jurisdiction of its Courts, if that judgment should be produced in any other State, against the defendant, the jurisdiction of the Court might be inquired into, and if a want of jurisdiction appeared, no credit would be given to the judgment.

"In order to entitle the judgment rendered, in any Court of the United States, to the full faith and credit mentioned in the Federal Constitution, the Court must have had jurisdiction, not only of the cause, but of the parties.

"To illustrate this position, it may be remarked that a debtor, living in Massachusetts, may have goods, effects, or credits, in

New Hampshire, where the creditor lives. The creditor there may lawfully attach these, pursuant to the laws of that State, in the hands of the bailiff, factor, trustee, or garnishee, of his debtor; and, on recovering judgment, those goods, effects, and credits, may lawfully be applied to satisfy the judgment; and the bailiff, factor, trustee, or garnishee, if sued in this State for those goods, effects, or credits, shall in our Courts be protected by that judgment, the Court in New Hampshire having jurisdiction of the cause, for the purpose of rendering that judgment; and the bailiff, factor, trustee, or garnishee, producing it, not to obtain execution of it here, but for his own justification. If, however, those goods, effects, and credits, are insufficient to satisfy the judgment, and the creditor should sue an action on that judgment, in this State, to obtain satisfaction, he must fail, because the defendant was not personally amenable to the jurisdiction of the Court rendering the judgment." (9 Mass. 468.)

In the subsequent case of *Hall v. Williams* (6 Pick. 240), which was a suit upon a judgment recovered in Georgia without personal service of the defendants, Chief Justice PARKER, in delivering the opinion of the Court, says:

"If the States were merely foreign to each other, we have seen that a judgment in one would not be received in another as a record, but merely as evidence of debt, controvertible by the party sued upon it. By the Constitution, such a judgment is to have the same effect it would have in the State where it was rendered; that is, it is to conclude as to everything over which the Court which rendered it had jurisdiction. If the property of a citizen of another State, within its lawful jurisdiction, is condemned by lawful process there, the decree is final and conclusive. If the citizen himself is there, and served with process, he is bound to appear and make his defense, or submit to the consequences; but if never there, there is no jurisdiction over his person, and a judgment cannot follow him beyond the territories of the State, and if it does, he may treat it as a nullity, and the Courts here will so treat it, when it is made to appear in a legal way that he was never a proper subject of the adjudication." See also *Kelliwin v. Woodworth*, 5 John. 37; *Spencer v. Brockway*, 1 Ohio, 259; *Evans v. Tatem*, 9 Serg. & R. 252; *Borden v. Fitch*, 15 John. 140; *Thurber v. Blackbourne*, 1 N. H. 242; *Rangeley v. Webster*, 11 N. H. 304.

If the judgment would not support an action by the plaintiff against the defendants, it must be equally unavailing when offered in support of a plea of former recovery in an action upon the original demand. To hold otherwise would be to hold that the validity or invalidity of the judgment depends not upon the want of jurisdiction in the Court, but from the mode in which the judgment is pleaded.

The Statute of Limitations relied upon, fixes two years from the accruing of the cause of action, as the period within which the action must be brought, and the defendant contends that

the cause of action accrued when the proceeds of the sale were received by him in June, 1853, and not when the demand was made upon him to account and pay over in July, 1856. The rule in relation to factors or consignees, is well settled that they are not liable to an action until a demand, or instructions to remit. They are not bound to take upon themselves the risk of remittance, but may await the orders of their principals. (*Ferris v. Paris*, 10 Johns. 285; *Cooley v. Betts*, 24 Wend. 203; *Baird v. Walker*, 12 Barb. 300.)

The counsel of the defendant does not question the general rule, but denies its application to the present case. He contends that, as the agreement of the defendant was to sell the goods and "send the money to the plaintiffs," no further instructions or demand were necessary, that it became the duty of the defendant, by his agreement, to remit immediately upon the sale, and for his failure a cause of action then accrued. A demand, or instructions to remit, are necessary to render a consignee liable, because until such demand is made, or instructions a regiven, he cannot know what disposition his principal may wish to be made of the proceeds; whether remitted, or paid to third parties, or held subject to his orders.

It is the duty of a consignee to render an account of his sales, but he is not bound to take upon himself the risk of remittance, nor can he throw such risk upon his principal without orders. But where, as in the present case, the remittance of the proceeds upon sale, enters into the agreement upon which the consignment is made, there can be no occasion for any further instructions or any demand to put the consignee in default. The general rule cannot apply, for the reason that the rule fails. We hold, then, that the cause of action accrued in the present case upon the neglect of the defendant to remit the proceeds immediately upon the sale; and that no demand was necessary.

The remittance would have been at the risk of the plaintiffs, if *made in the ordinary and customary mode by which funds were at the time transmitted to New York from California.

But the consequences do not follow which the counsel of the defendant supposed. It does not necessarily follow that the Statute of Limitations runs against the plaintiffs, from the day the proceeds of the consignment came into the defendant's hands. It appears from the evidence, and it is stated as a fact in the opinion of the Court below, that the defendant never rendered any account of sales to the plaintiffs, and there is nothing in the record which shows that they ever had any knowledge of the sales until shortly previous to the commencement of this suit. The complaint in the New York suit alleges a sale only upon information and belief; it contains no positive averment of the fact. It was the duty of the defendant not only to inform the plaintiffs of the sales, but to remit the proceeds. His neglect not only deprived them of their funds, but kept them in ignorance of their rights.

To hold that the Statute of Limitations ran against them under such circumstances, would be to permit the defendant to take advantage of his own wrong; and to sustain a defense which, in conscience, he ought not to be permitted to avail himself of.

Statutes of Limitations are passed to prevent the production of stale claims, when, from the lapse of time, it has become difficult or impossible to furnish the requisite proof to defeat them. They proceed upon the theory that the delay, for a fixed period, to assert one's claim, raises a presumption of settlement, and that a party ought not to be afterwards harassed respecting it. They are not intended to protect a party who has by fraudulent concealment delayed the assertion of a right against him, until after the expiration of the period limited by the statute. All the exceptions specified in the statute which prevent its running, are cases where a party is not in a situation to assert fully his rights. The reason of those exceptions would seem to apply with equal force to a case of fraudulent concealment.

The question whether a fraudulent concealment of the fact, upon the existence of which the cause of action accrues, would avoid the Statute of Limitations, has frequently arisen, and in its decision there is much conflict of opinion. In Courts of Equity it is the settled doctrine that such concealment will prevent the operation of the statute, and it is only in the application of the doctrine to suits at law that the diversity of opinion exists. (*Booth v. Lord Warrington*, 4 Bro. Parl. Cas. 163; *South Sea Co. v. Wymonsdell*, 3 P. Wms. 143.)

In *Bree v. Holbrect* (Doug. 655), which was an action of *assumpsit*, fraud, and its discovery within six years was replied to the plea of the statute, but the case passed off upon the insufficiency of the facts as constituting fraud alleged in the replication; and Lord MANSFIELD said: "There may be cases, [459] too, which fraud will take out of the Statute of Limitations. But here everything alleged in the replication may be true without any fraud on the part of the defendant," and the plaintiff had leave to amend, in case, upon inquiry, the facts would support a charge of fraud. In *Short v. McCarthy*, 3 Barn. & Ald. 626, which was an action of *assumpsit*, in which the breach alleged was negligence of the defendant, the attorney employed to make certain inquiries at the Bank of England, no replication was filed to the plea of the statute, and to the position taken by counsel that as a discovery of the negligence was not made until within the six years, the cause of action had not accrued, Mr. Justice BAYLEY said: "If the want of knowledge could take the case out of the Statute of Limitations, it would be competent to the plaintiff to state this in his replication." The decision in that case passed upon the insufficiency of the pleadings to sustain the action, on the ground of a new promise. There was no pretence of fraudulent concealment, In *Brown v. Howard* (2 Brod. & Bing. 74), the plaintiff employed the de-

fendant, in 1808, to invest money in the purchase of an annuity, and discovered in 1814, that the security was void within the defendant's own knowledge at the time of the purchase. In 1820, the plaintiff sued the defendant for breach of the implied contract to provide good security. The defendant pleaded the general issue and Statute of Limitations, and the Court held that the action proceeding on the contract, and not on the fraud, the statute was a good bar. There was no replication to the plea, and the case of *Short v. McCarthy*, was cited as "the strong case" in point, and Mr. Justice DALLAS said:

"The plaintiff will not be without remedy, because he will be only nonsuited here, and may, if he deems it to his advantage, bring another action, the ground of which may be fraud, though on the propriety of such a step we give no opinion; but in *Bree v. Holbrecht*, Dougl. 632, it is laid down that in cases of fraud the limitation only runs from the time when the fraud is discovered;" and Mr. Justice PARK said, "I am of the same opinion, although this is a case of such hardship in the plaintiff that the Court would, if it were possible, get out of the course of decisions."

In the Courts of New York it is held that a fraudulent concealment is not a good answer to the plea of the statute. In the case of *Troup v. The Executors of Smith*, 20 Johns. 33, the question was directly raised, and deliberately considered, and it was held that the statute began to run from the time the fraud was perpetrated, and not from its discovery, and that the Court was bound by the letter of the statute, and could not introduce exceptions to its operations not included in its provisions, and this decision was affirmed in the subsequent cases of *Leonard v. Pitney*, 5 Wend. 30, and *Allen v. Mille*, 17 Wend. 202. In [460] *both of the Carolinas and in Virginia a similar construction is given to the statute. (*Miles v. Berry*, 1 Hill S. C. 296; *Callis v. Waddy*, 2 Munf. 511.)

But in several of the States the doctrine is maintained that the statute does not operate in cases of fraud until a discovery is made by the party affected. In the case of *First Massachusetts Turnpike Co. v. Field*, 3 Mass. 201, the question was distinctly raised, and it was held by the Court that a fraudulent concealment by the defendant that a cause of action had accrued to the plaintiff was a good replication to the plea of the statute. That was an action of *assumpsit* upon a contract for the construction of a road. The declaration contained two counts—one on the contract, and the other for money had and received. To the pleas of the statute, the plaintiff replied fraud in the execution of the work, its discovery long after the payment of the money, and the commencement of the action within six years after the discovery.

In overruling the demurrer to the replications, Chief Justice PARSONS says:

"The delay in bringing the suit is owing to the fraud of the defendant, and the cause of action against him ought not to be considered as having accrued until the plaintiff could obtain the

knowledge that he had a cause of action. If this knowledge is fraudulently concealed from him by the defendant, we should violate a sound rule of law if we permitted the defendant to avail himself of his own fraud. * * * I am, therefore, satisfied, although the plaintiffs' cause of action, mentioned in the first count, literally accrued at the time when the contract was to have been executed, and the one mentioned in the second count accrued from the payment of the money mentioned in their second replication, yet that these causes of action were fraudulently concealed by the defendants themselves from the knowledge of the plaintiffs long after, and that the plaintiffs brought their action within six years after the fraud was discovered. The necessary inference is, that the fraud of the defendants, disclosed in the replications of the plaintiffs, is sufficient in law to avoid the Statute of Limitations pleaded in the defendants' bars, and that the plaintiffs' replications are good."

A similar construction of the statute prevails in Maine, New Hampshire, Pennsylvania, and Indiana. (*Cole v. McGlathry*, 9 Greenl. 131; *Bush v. Barr*, 1 Watts, 110; *Mitchell v. Thompson*, 1 McLean, 85; *Jones v. Conway*, 4 Yeates, 109.)

In *Sherwood v. Sutton*, 5 Mas. 143, Mr. Justice STORR, in sustaining, in an action on the case, the sufficiency of the replication of fraudulent concealment to the plea of the statute of New Hampshire, gave a lengthy opinion, holding that, as the statute was mainly intended to suppress fraud, it should be so construed, as not to encourage fraud, if it would admit of any other reasonable interpretation, and that cases of fraud, therefore, form an implied exception to be acted upon in Courts of Law and Equity, according to the nature of their respective jurisdictions. [461]

In this diversity of opinion on the question, we are free to adopt that rule which will best tend to advance justice, and prevent the perpetration of fraud; and we therefore hold, that in all cases a fraudulent concealment of the fact, upon the existence of which the cause of action accrues, is a good answer to the plea of the Statute of Limitations. By the system of practice adopted in this State, there is no replication to the answer. The fraudulent concealment cannot, therefore, be replied to by pleading, but it may be established by proof on the trial, and will then just as effectually avoid the plea of the statute. In the present case, the plaintiffs are residents of New York; they looked to their consignee in California to acquaint them of the sale of their goods; his delay of three years to impart any information, cannot be reconciled with honest intentions, but necessarily leads to the conclusion that the sale was concealed for a fraudulent purpose.

The judgment must be affirmed.

BRYAN v. RAMIREZ ET AL.

¹ **ACKNOWLEDGMENT, WHAT TO BE STATED IN CERTIFICATE.**—A certificate of acknowledgment to a deed, in effect as follows: "Personally appeared etc., A. B., known to me to be the person described in, and who executed the same, freely, voluntarily, and for the uses and purposes therein mentioned," is insufficient.

IDEM.—Such a certificate does not state "the fact of acknowledgment."

² **ESTOPPEL BY SILENCE.**—When a person knowingly, though passively, looks on and suffers another to purchase and expend money on land under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to assert his legal right against such person.

² **POSSESSION AS NOTICE OF EQUITABLE TITLE.**—And a purchaser of the legal title has notice of the equity of another in possession.

IDEM.—And where six persons held in common the legal title, one of whom was present and remained silent when the holder of the equity purchased, under the opinion that he was obtaining the title: *Held*, that the one sixth of the legal title, in the hands of subsequent purchasers, was subject to that equity coupled with possession prior to their purchase.

APPEAL from the District Court of the Tenth Judicial District, County of Yuba.

This was a bill to quiet a title to two lots in the city of Marysville. The facts, so far as necessary to illustrate the points determined, were substantially these: On the 22d of April, 1850, Charles Covillaud, J. M. Ramirez, John Sampson, R. B. Buchanan, and S. N. Swezy, conveyed the lots, with others, by deed absolute, to Joseph W. Finley, for a certain consideration thereafter to be paid. Finley executed to the grantors his three several promissory notes for the [462] amount of the purchase-money. On the 27th of July, 1850, Finley mortgaged the property to one Sparks, and on the 28th of November, 1850, Finley reconveyed the property to Covillaud, Ramirez, Buchanan, Swezy, and William H. and C. B. Sampson, heirs of John Sampson, deceased. On the 18th of January, 1851, Swezy conveyed his interest to Ramirez and the two Sampsons. The deeds and mortgage were all acknowledged and recorded. Sparks obtained judgment of foreclosure against Finley on the 25th of June, 1851, and the property was sold by the sheriff, and purchased by the plaintiff on the 8th of August, 1851, and a sheriff's deed duly executed and recorded. The plaintiff then took possession of the property, enclosed it with a fence, planted some trees, and paid the taxes, and has continued in possession ever since. By several conveyances from the other grantees, the title conveyed by Finley by his deed of reconveyance, came to the defendants, who are now the only adverse claimants to the plaintiff.

The acknowledgment of the mortgage from Finley to Sparks omits to state that Finley "acknowledged that he executed"

1. Cited *Henderson v. Grewell*, post 584.

2. Cited *Woodson v. McCune*, 17 Cal. 304; *Grattan v. Wiggins*, 23 Cal. 87; *Morans v. Palmer*, 13 Mich. 377. See *Hopkins v. Delaney*, ante 85.

the instrument. The terms of the acknowledgment are set forth in the opinion of the Court. It was in evidence that Buchanan, Swezy, and one of the Sampsons (it does not appear which), were present at the sale without informing the plaintiff of their claim. At that time, Swezy and Buchanan had parted with their interest in the land.

The plaintiff had a decree in the Court below, and the defendants appealed.

Field, for Appellants.

As to the alleged possession of the plaintiff of the lots in controversy, after sale by the sheriff, and improvements thereon, it appears that the possession consisted only of an enclosure by a fence, and the improvements consisted in the planting of some trees, which soon after died. And there is no evidence in the case that the defendants had any knowledge even of this, and they deny, in their answer, that they had any knowledge of such possession and improvements. The plaintiff never occupied the lots, nor were they occupied by any one.

The Supreme Court has recently decided, in the case of *Merrick v. Sunderland* (July Term, 1856), that it was the intention of the Registry Act of this State to establish one system of notices, and to substitute the constructive notice thus established, in place of all other kinds of notice, and thus to abolish the presumption of notice arising from possession.

So, as to the question of notice by the alleged possession, the appellants contend:

1. That whatever may be the doctrine as to constructive notice, by possession, under an executory contract, for the sale of *land, under our statute there can be no constructive notice of a deed, except such as is given by the registry, and to this effect is the decision of this Court in *Merrick v. Sunderland*.

2. That there was no such possession arising from the simple enclosure by a fence—which is done even by squatters—and the planting of a few trees, so as to operate as notice, and break in upon the policy of the Registry Act.

3. Even if the plaintiff had taken and kept actual possession of the lots, after his purchase, yet such possession could in no way affect the title of the defendants, acquired nearly ten months previously, by a deed, which was recorded seven months previously, and which, by its record, imparted notice to all the world.

When possession is held as notice, it is of course only to subsequent purchasers, or mortgagees. It is absurd to say that it has, or can have any effect upon previous purchasers. But it is contended, and was so held in the Court below, that the defendants are estopped from setting up their title now, against the plaintiff, by neglecting to claim or assert it, at the sheriff's sale.

It was also contended, and it was so held in the Court below, that Sparks, by his alleged mortgage, had an equitable lien on

the two lots, and that the defendants having taken a re-conveyance back to them of the lots, in consequence of the non-payment of the balance of the notes given by Finley, on the original sale, were not *bona fide* purchasers, for a valuable consideration, so as to hold the title as against the plaintiff, as a purchaser under the alleged mortgage.

The case then reduces itself to four questions:

First—Had the defendants any constructive notice from the record, of the alleged mortgage from Finley to Sparks, dated July 27, 1850?

Whether there was any constructive notice, depends upon the question whether the instrument was properly recorded; and whether it was properly recorded, depends upon the further question, whether it was acknowledged so as to entitle it to record.

The defendants contend that the certificate of the officer, of the execution of the mortgage, did not entitle it to record, inasmuch as it does not state that the execution was acknowledged by Finley to him.

It is essential to the validity of every certificate of acknowledgment, taken before the officer, that it should state two things:

1. Knowledge by the officer of the person executing the instrument, or that such person was proved to the satisfaction of the officer.

2. The fact of acknowledgment.

By the statute, then, to operate as notice, the instrument must *be recorded, but to entitle it to record it must be proved or acknowledged, and if acknowledged, the certificate must state the fact of acknowledgment.

Second—The rights of the defendants are in no way affected by the judgment recovered by Sparks against Finley, or the sale under it.

The defendants were strangers to the suit. (4 Cowen & Hill's notes to Phillips Ev., pp. 1 and 165, and authorities there cited; 1 Greenl., Sec. 523; *Jackson v. Verder*, 3 Johns. p. 12; 2 Phillips Ev. 4.)

From these authorities it is clear that the title of the defendants, Ramirez and Charles B. Sampson, to their respective lots, is in no way affected by the instrument placed on the books of the recorder as a mortgage from Finley to Sparks, or by the judgment recovered by Sparks against Finley, and the sale, under it.

Third—The defendants Ramirez and C. B. Sampson, are in no way estopped from asserting their title to the lots now by any alleged neglect to claim or assert the same at the sheriff's sale; and the ruling of the Court below is preposterously absurd.

1. At the time of the sheriff's sale, Mr. Ramirez, who claims one of the lots, was in Europe.

2. There is no evidence in the case whatever that Charles B. Sampson, who claims the other lot, was present at the sale, or ever heard of any such sale even.

3. Swezy had sold all his interest to Ramirez and the two Sampsons, in these and other lots, eight months previous.

4. There is no evidence whatever in the case, that the defendants ever knew, or heard, or saw, any improvements made upon the lots by the plaintiff, or by any one else, or that they ever even were in sight of the lots, and the finding of the Court below is mere assumption, unsupported by any evidence whatever in the case.

But even if the parties by the re-conveyance back became joint-tenants, notice to one is notice to all. One joint-tenant cannot dispose of his co-tenant's interest, and of course cannot by silence, on receipts of notice, affect his co-tenant's interest. (4 Kent, p. 374; side page 359, and note.)

Fourth—The defendants were *bona fide* purchasers for a valuable consideration, of the lots, so as to hold the title against the alleged equitable lien of Sparks by the alleged mortgage, or the title of the plaintiff as purchaser under that mortgage.

There was a change in their rights effected by this purchase back. (*Dickinson v. Tillinghast*, 4 Paige, 221.)

If the conveyance is taken in satisfaction or extinguishment of a previous liability, or as a mortgage, or if the rights of parties at the time or in consequence of the conveyance, subsequently, before notice of the prior equities are changed thereby, *then the grantee is a holder for value, and the [465] property is unaffected by prior equities. (*Blanchard v. Stevens*, 3 Cush. 162; *Swift v. Tyson*, 16 Pet. 1; *Brush v. Scribner*, 11 Conn. 388; *Holmes v. Smith*, 16 Me. 177, 180; *Morton v. Waite*, 20 Me. 175.)

Charles H. Bryan, Respondent, in person.

The whole case of appellants rests upon the isolated position that the acknowledgment of the mortgage to Sparks, is not a substantial compliance with our Registry Act.

There is everything necessary to ascertain the fact of acknowledgment. He knows the grantor, and knows that he freely and voluntarily executed the same. It is not absolutely necessary that the word "acknowledge" should be used, if we can gather from the certificate the fact that the notary knew that he executed the instrument freely and voluntarily, for the purposes mentioned in the deed.

If the notary knows him to be the man, and certifies that he knows that he did freely and voluntarily sign for the uses and purposes of the deed, does this not necessarily imply the fact of acknowledgment?

Could the notary know that he had freely and voluntarily executed the instrument without the acknowledgment of the party?

The identical word "acknowledge," need not be used where the language employed shows sufficiently that it was the free act and deed of the party. This is what is meant under section twenty-third of the act, that a substantial compliance is sufficient.

manner of its execution. It is "the fact of acknowledgment" that forever afterwards binds the party. Although a man may not execute the instrument freely, in point of fact, yet if he make the acknowledgment properly, he is afterwards estopped to deny it, as against subsequent innocent parties. The object of the statute was to make the acknowledgment of the party operate as an estoppel, and for that reason requires the fact of acknowledgment to be stated in the certificate.

But, conceding that the certificate was defective, and that the record of the mortgage was not notice to the defendants, the plaintiffs insist that they are not innocent purchasers for value. The defendants proved that the consideration for the deed of re-conveyance was "the non-payment" of two thirds of the purchase-money. Finley had paid one of the three notes given for these and other lots; and failing to pay the other two, the vendors took from him a deed of re-conveyance. [467] It is insisted by the plaintiff that the proof does not show that the two notes were delivered to Finley. But we think the evidence shows this substantially.

Another ground urged by plaintiff against the title set up by defendants is that one of the Sampsons, Buchanan, and Swezy, were present at the Sheriff's sale, and suffered the plaintiff to purchase in ignorance of the adverse claim, and, therefore, that the defendants cannot, in a Court of Equity, be allowed to set up their title.

The rule is well stated in the opinion of the Chancellor in the case of *Wendell v. Van Rensselaer*, 1 Johns. Ch. Rep. 254: "There is no principle better established in this Court, nor one founded on more solid considerations of public utility than that which declares that if one man knowingly, though he does it passively, by looking on, suffers another to purchase and expend money on land, under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to exercise his legal right against such person."

In reference to this subject, Mr. Justice Wood, in delivering the opinion of the Supreme Court of Ohio, in the case of *Buckingham and others v. Smith and Dille*, (10 Ohio, 298), uses this concise and forcible language:

"The rule is, if one is silent when he *should* speak, that justice will compel him to silence when he *would* speak."

But conceding that the conduct of Sampson would have estopped him from asserting his title as against the plaintiff, how far would the defendants be affected as subsequent purchasers in good faith, and for value. In reference to Swezy, his title had been previously conveyed to others, and he was a stranger at the sale, and his conduct could bind no one but himself, if it could bind him. And as to Buchanan, he had previously, on the 14th of September, 1850, transferred his interest in the notes of Finley, and the lots for which they were given, by written agreement, to Ramirez, and, therefore, had no interest in the property.

When a party has an equity, and also actual possession of the property, a purchaser of the legal title is bound to take notice.

The law permits an equity to exist, but does not require or permit it to be recorded; and when the party holding the equity does all the law will permit him to do, his equity will be protected, and all who purchase of a grantor, out of possession, must take notice. This point is very fully considered, in my opinion, in the case of *Bird v. Dennison*, 7 Cal. 297: "Possession under an equitable claim infects the purchaser of the legal title, with notice of that equity." (4 B. Mon. 178; 5 Johns. Ch. 33.)

If, then, it be true that defendants, in contemplation [468] of law, *had notice of plaintiff's equity, they must be affected in the same way, and to the same extent, that Sampson would have been had he still retained his title. The conveyance from one of the Sampsons was executed after the plaintiff had possession, and therefore the purchasers took with notice of the plaintiff's equity.

There was no proof that Ramirez, Covillaud, and both of the Sampsons, were present at the sale, and the conduct of the other Sampson could not affect them as to their own title. Even had it been shown that Ramirez, Covillaud, and one of the Sampsons knew that the sale would take place, and failed to attend, their existing rights could not be prejudiced thereby. The defect in the certificate of acknowledgment indorsed upon the mortgage was legally known to the plaintiff, and as no title had thereby passed from Finley, as against subsequent purchasers, all parties claiming under the mortgage were bound by the record of the deed of re-conveyance from Finley to his original grantors. It was not, then, incumbent upon those not present at the sale, to give any further notice to the plaintiff. A party having recorded his title in such a case, could not be required to know of, or attend any sale that might take place. If present at the sale, and he remains silent, and knowingly permits another to purchase under an erroneous impression as to the title he buys, then he would be culpable, and be held responsible accordingly.

So far, then, as regards the original purchase of the plaintiff, there is no proof that Ramirez, Covillaud, and one of the Sampsons were at all to blame. And as to the alleged conduct of the defendants subsequent to the sale, in permitting plaintiff to expend money in making improvements upon the property without any known objection, there is not sufficient evidence to put them in the wrong. The plaintiffs could only resist the title of defendants, so far as it is affected by their own conduct, by showing actual fraud on their part, and entire innocence on his own. To prove fraud, the evidence should be strong and decisive. The fact that the defendants were residents of the place would no more show that they knew the plaintiff was ignorant of their claim, than the fact of the plaintiff's residence would be proof

that he knew of the record of their deed. From the evidence it would seem most probable that both parties knew of the claims of each other, and both were doubtful as to the sufficiency of the certificate to the mortgage; and neither party was willing to go into an expensive lawsuit upon a doubtful title, until the property became valuable. The defendants having put their deed on record, the plaintiff was affected with notice, and he was himself negligent. If he could have shown any positive misconduct on the part of the defendants, or any actual concealment on their part, then there would have been some ground for redress. The improvements put upon the property were not such as to *give notice that the party making them acted under [469] the *bona fide* belief that he had an actual existing title.

The result of the view we have taken, is this: The defendants are not entitled to set up against the plaintiff any title they, or either of them, have derived from one of the Sampsons. And as there is certain proof that one of the Sampsons was present, though it is not shown which, yet it is shown that the present defendants hold the same title that the one present did then hold; so the result is the same as if it were shown which of the two were present. The plaintiff is therefore entitled to whatever legal title was in one of the Sampsons, at the time of the sale.

The decree of the Court below is reversed, and that Court will render a decree in conformity with this opinion.

BOSWELL ET AL. v. LAIRD ET AL.

MASTER—WHEN NOT LIABLE FOR NEGLIGENCE OF SERVANT.—Where parties employed architects, reputed to be skillful in their profession, to construct, at a designated point on a creek, a dam, or embankment, of certain specified dimensions, capable of resisting all floods, and freshets of the stream for the period of two years, and to deliver it completed by a given time; and before the embankment was completed it was broken by a sudden freshet, and a large body of water, confined by it, rushed down the channel of the stream, carrying away and destroying, in its course, the store of plaintiffs, with their stock of merchandise. The employers exercised no supervision, gave no directions, furnished no materials, nor had they accepted the work. Plaintiffs having brought suit to recover the damage sustained by them, against the employers and contractors: *Held*, that the latter alone were liable.

¹ **IDEM.—RESPONDEAT SUPERIORE, WHEN NOT TO APPLY.**—The relation of the parties is that of independent contractors; the relation of master and servant, or superior and subordinate, did not exist between them, and therefore the doctrine *respondet superior* does not apply to the case.

IDEM.—CONTRACTOR'S LIABILITY.—The architects alone were responsible to third parties, the defective construction which caused the injury not being inherent in the original plan contracted for. If the plan of this work had been devised by the owners, and the builders simply engaged to carry it out, and the defects from which the injuries resulted had been inherent in the plan, then the former would have been liable to plaintiffs.

¹ **IDEM.**—A person who undertakes the erection of a building, or other work,

1. Approved *Fanjoy v. Seales*, 23 Cal. 249; *Baker v. Kinsey*, 33 Cal. 634. Approved *Duprat v. Luck*, 38 Cal. 692; *O'Hale v. Sacramento*, 48 Cal. 214; *Stephani v. Brown*, 40 Ill. 436; *Meyer v. Simland P. B. R. Co.*, 2 Neb. 322.

for his own benefit, is not responsible for injuries to third persons, occasioned by the negligence of a person, or his servants, who are actually engaged in executing the whole work, under an independent contract.

IDEM.—RIGHT OF SELECTION NECESSARY TO FIX LIABILITY.—The right of selection is the basis of the responsibility of a master or principal for the acts of his agent. No one can be held responsible, as principal, who has not the right to choose the agent from whose act the injury flows.

1 MASTER LIABLE AFTER ACCEPTANCE OF WORK.—After the acceptance of the work, or construction, by the person for whom it was built, he becomes liable for subsequent injuries, having thus assumed the responsibility of its sufficiency; and the liability of the contractors ceases.

IDEM.—Where the enterprise undertaken is a lawful one, and is entrusted to competent and skillful architects, the mere fact that the improvements are erected upon the land of the proprietor is no just reason why liability should attach to him, during its progress, any more than if such enterprise be executed elsewhere.

APPEAL from the District Court of the Fourteenth Judicial District, County of Nevada.

In June, 1856, the defendants Laird and Chambers [470] contracted *with their co-defendants, Moore and Foss, the latter being architects, of reputed skill and experience, for the construction of a dam, forty feet in height, on Deer Creek, at a point several miles above the city of Nevada. The design of this dam was to force an accumulation of the waters of said creek, at that point, so as to fill a basin of about one hundred acres, immediately above the dam, with water, that could be used for mining purposes, during the summer season.

Under the contract, Moore and Foss bound themselves to construct across said stream, at their own expense of money, material, and labor, a dam, or embankment, forty feet high, of substantial material and skillful workmanship, capable of resisting all floods and freshets, for the period of two years from its completion, and to deliver the same to defendants Laird and Chambers, complete, on or before a given time, guarantying it to withstand the floods and freshets, for such period from its completion.

Laird and Chambers bound themselves to pay Moore and Foss certain sums of money, as the work progressed, and upon the completion of the dam, according to the stipulation, to accept and receive the same, and pay them the balance due under the contract.

Moore and Foss commenced work on the dam in July, 1856, ceased for a short time, re-commenced in October, 1856, and from that time continued, according to their own model and plan, to construct the dam.

On the 15th of February, 1857, before the work was wholly completed, and before it had been accepted by Laird and Chambers, it was carried away by a sudden storm and freshet.

The plaintiffs in this cause, Boswell & Hanson, were merchants in the city of Nevada, and had in the month of September,

1856, erected a store on the margin of Deer Creek, and put therein a large stock of goods.

When the dam, on the 15th of February, 1857, broke away, a great volume of water was loosened in the channel of the creek, and, sweeping down in a torrent, the waters carried away and destroyed the building, store, and stock of goods belonging to plaintiffs. The testimony showed that Laird and Chambers had not been at the dam from the day of the commencement, until after the breakage; that they prescribed no plan for its construction, furnished no materials, neither employed nor directed any hand engaged upon the work, nor took any part in, or control over the same; had not received the work from the contractors, nor had Moore and Foss completed the work, nor delivered or tendered the same to Laird and Chambers, at any time before the injury to plaintiffs occurred.

It further appeared, on the trial, that about fifteen hours before the dam gave way, word was sent to the plaintiffs of the anticipated danger, and that no attention was paid [471] to the warning. On the conclusion of plaintiff's testimony, counsel for defendants Laird and Chambers, moved the Court below for a nonsuit as to them, which motion the Court overruled, and defendants Laird and Chambers excepted.

After the evidence was finished, the Court was asked by defendants (among others) to give the following instructions to the jury—which, being refused, the defendants Laird and Chambers excepted:

"Where one or more persons engage for the construction of a work or dam, with contractors to whom are given the entire control of the work, the selection of the mode and model, and the choice and employment of the hands assisting, such person or persons so engaging are not responsible in law for damages resulting from the negligence or unskillfulness of such contractors, or of any of their hands about such work. And if, from the evidence, the jury believe that under the contract between Laird and Chambers, of the one side, and Moore and Foss, of the other, for the construction of the dam across Deer Creek, Moore and Foss acted under an independent employment, had the sole control of the work, and the manner of its building, the employment and management of the hands engaged thereon, and that Laird and Chambers had not received the dam from such contractors before it broke, the jury will find for the defendants Laird and Chambers.

"Where one or more persons engage for the construction of a work, with contractors to whom are entrusted the sole and entire direction and control of the work, as well as the employment and management of all assistants, the relation of principal and agent, or master and servant, does not exist between such persons and such contractors, and such persons are not responsible for any negligence or unskillfulness of such contractors, or those employed by them."

The Court, at the request of plaintiffs (among others), gave to

the jury the following instruction, under the exceptions of Laird and Chambers' counsel: "That if the defendants Laird and Chambers employed the defendants Moore and Moss to construct the dam referred to in the pleadings and evidence in this cause at the point where the same was erected, and such dam gave away and broke by reason of its unskillful construction, and an injury resulted therefrom to plaintiffs, that then defendants Laird and Chambers are liable in this suit."

The jury found a verdict for plaintiffs, of five thousand dollars, on which judgment was rendered against all the defendants, who moved for a new trial; which, being denied, they appealed.

H. Meredith, for Appellants.

Where defendant's house was injured, by means of excavation, *for improvements on an adjoining lot, defendant cannot recover, where he was warned and took no measures to protect himself and prevent the injury. (12 Liv. Law Mag. 5,701; *Dunlap v. Wallingford*, Penn. Sup. Co. R. 1854.)

The exception next arising on this appeal, for the consideration of this Court, is that taken to the order of the Court below, overruling the motion for nonsuit as to Laird and Chambers, defendants—the grounds assigned for said motion being, as set forth in statement of case of transcript, to wit: that the evidence before the jury showed that defendants Laird and Chambers were not liable for the injuries complained of; their connection with the construction and maintenance of the dam, the breakage of which occasioned the injury, being only by means of a contract with defendants Moore and Foss, under an independent employment, and one clearly excluding the relation of master and servant, or principal and agent; the contractors being engaged upon the work, and having entire control and management of the same at the time of such breakage.

This proposition involves a principle of importance far beyond its effect upon this case, or the interest of the parties immediately concerned.

Upon the maintenance, by our Courts, of the principle on which defendants rely in making this motion, the mechanical skill and industry, as well as the development of the resources and wealth of our people and country, greatly depend. To encourage science and skill in the mechanical arts, an avenue to an independent position, above the degree of servant or agent, should be secured and recognized for the proficient. Capital should be allowed, without hazard, to contract with the scientific and skillful, for the performance of any work peculiarly belonging to their department. Inducements of constant and powerful operation may be thus held out to all, to acquire superior proficiency in any given line of the mechanical arts. The most proficient become the most sure of employment and reward.

On the contrary, if capital, contracting for the erection or construction of a given work, is to be held responsible for the failures and omissions of the contractor, under all circumstances

and phases of bargains, capital must become, in all transactions, the superintendent—and the proficient in any trade or art be confined to the common level of the ignorant and incompetent.

In thus taking away the rewards and encouragements for proficiency, all progress and advancement in the great arts which make a people and nation wise, wealthy, powerful, and prosperous, are impaired, if not entirely destroyed.

The work to be performed in this case was the construction of a frame dam or embankment, to accumulate the waters of a stream for useful and lawful purposes. A knowledge, not merely of the business of the carpenter and joiner, but of the science of *hydrostatics and hydraulics, as also the relative [473] strength of the various materials, was necessary to its due performance.

Laird and Chambers, who were merely miners, would have been deemed reckless had they undertaken, unaided, such a work. The law required greater prudence on their part, and what reason and law required, they did. They employed experienced and skillful workmen to construct the dam according to the rules established by their experience and learning, under an independent employment, leaving the whole to their control, they to pay for the same, and to accept the same upon its completion.

In preserving the encouragements for proficiency in mechanical industry, the best and surest way is kept open to the rapid and full development of the natural wealth of the land. If capital cannot avail itself of skill and science without risk, and the necessity of personal superintendence, under an independent employment and contract, it will remain idle and unexpended, and the immense works, such as damming streams and torrents, and the lakes of our mountains, necessary to the prosperity of our State, remain forever objects of our dreams instead of realities. The mineral region of California is the field where industry looks for its reward; the gold embosomed in the sands and rocks of our mountains, the life-blood which fills the veins of commerce and enterprise; and water, the indispensable element to make those mines fruitful, and to cause the gold to flow, heaven, in its bounty, supplies an abundance during the year, but too much comes at one season, and too little at another. It is left for man's ingenuity and energy to arrest the escaping surplus of water, and confine it for profitable use in summer.

To secure this desideratum, common alike to all of the land, no business, trade, or art, should be more carefully protected—proficiency in none more generously encouraged, than the art of building dams, reservoirs, aqueducts and embankments, those means of man in controlling water, the main lever of our industry and prosperity.

The evidence of the plaintiffs clearly established that the relation of master and servant, or principal and agent, did not

exist between Laird and Chambers, and Moore and Foss, the contractors and builders.

Laird and Chambers could only be held by the doctrine of *respondeat superior*, and that applies solely where the relation of principal and agent exists.

No responsibility can fasten itself upon them, as an incident to their ownership of the soil on which the dam was being constructed, as has been adjudged to do, where a fee-simple owner suffered a nuisance on his land.

Laird and Chambers had no legal right whatever over the ground or soil—having no deed to it—no patent, and [474] having *made no location of a warrant or claim to any given spot or quantity of ground, under any existing law. They had neither title, color of title, or possession. Such being the facts and circumstances, as shown by plaintiff's own evidence, we contend there was nothing to submit to the jury in the case, as to defendants Laird and Chambers, and defendants' motion for a nonsuit should have been granted.

A person agreeing for a specific construction with a contractor, under an independent employment, to whom is given the entire control of the work, the selection of those by whom, and the manner how it shall be done, does not stand in the relation of master and servant, as to such contractor, and is not responsible for damages arising from the negligence of such contractor, or any employee of such contractor. (*Pack v. The Mayor, etc., of New York*, 4 Seld. 222; *Blake v. Ferris*, 1 Seld. 48; *Kelly v. The Mayor, etc., of New York*, 1 Kern. 432; *De Forrest v. Wright*, 2 Mich. 368; *Moore v. Seaborne*, Id. 530; *Quarman v. Burnett*, 6 Mees. & W. 510; *Hobbitt & Reider v. The N. W. Railway Co.* 4 Exch. 254.)

To render one person liable for the negligence of another, the relation of master and servant, or of principal and agent, must exist between them. (*Stevens v. Armstrong*, 2 Seld. 435; *City of Buffalo v. Holloway*, 3 Seld. 493; *Sproule v. Hemminway*, 14 Pick. 1; *Story on Agency*, Sec. 453, b. and c.; *Hobbitt & Reider v. The N. W. Railway Co.* 4 Exch. 254; 13 Jurist, 659.)

The evidence of plaintiff proved that Laird and Chambers contracted solely with Moore and Foss, for the completion, in a given time, of a work which was never completed, nor tendered to them, and that the work gave way while being erected by thirteen or seventeen others, who were solely employed by Moore and Foss, the contractors. These hands or employees of Moore and Foss, were the persons guilty of the negligence, if any was committed. Moore and Foss alone can be held responsible for their acts. Moore and Foss were their principals, and that precludes the idea that Laird and Chambers were.

There cannot be two superiors or principals at the same time, and where the employee commits the negligence, the responsibility is that of the immediate employer. (*Blake v. Ferris*, 1 Seld. 48; *Pack v. The Mayor of N. Y.* 4 Seld. 222; *Laugher v. Pointer*, 5 Barn. & C. 558.)

Where an employee is exercising a distinct and independent employment, and is not under the immediate control, direction, or supervision of the employer, the latter is not responsible for the carelessness or negligence of the employee. (*De Forrest v. Wright*, 2 Mich. 368.)

In such cases, the contractor alone is responsible for negligence arising from his conduct, or that of his [475] employees; and "when one contracted to cut logs the employees had on certain land, and to deliver them without assistance or supervision of or from the employees, the relation of master and servant does not exist, and the employee alone is liable for any injury occasioned to others, by his conduct in performing his contract. (*Moore v. Seaborn*, 2 Mich. 520; *Hobbitt v. N. W. Railway Co.*, 4 Exch. 256; *Allen v. Hayward*, 7 Owen's Bank. R. 970.)

The fact that the employer selected the employee does not determine or conclude the responsibility of the former. The power of direction, control and management, must be left with the primary employer, although he selected his employee. (*Kelly v. Mayor, etc.*, of N. Y., 1 Kern. 436; *Hobbitt v. N. W. R. Co.* 4 Exch. 258.)

"The proposition that a person shall be answerable for any injuries which arise in carrying into execution that which he has employed another to do, seems to be too large. His liability depends upon the nature of the employment, the occupation of the person employed, and the control and authority of the employee over the persons employed, as well as over the manner of the execution of the employment, as also upon the occasion and nature of the injury." (*Moore v. Seaborn*, 2 Mich. 530.)

"A master is responsible for the acts of his servant, but that a person is liable, not only for all the acts of his servant, but for any injury which arises by the act of another person, in carrying into execution that which that other person has contracted to do for his benefit, is too large a position—cannot be maintained without overturning some decisions, and must lead to consequences which would shock the common sense of all men." (*O— v. Burnett*, 6 Mees. & W. 510.)

The relation of master and servant has been constructively raised, by drawing a distinction between real property and personal, and the owner of real estate deemed the master of all engaged on his land. Laird and Chambers were not the owners of a foot of the land, and this doctrine constructively arising—this relationship cannot apply to this case, but we reply to the attempt to make it apply, by saying that the doctrine has been long since abandoned and overruled—at least so far modified that it cannot now affect the rights or responsibilities of the defendants Laird and Chambers.

"The owner of real estate is not answerable for acts of carelessness, negligence and mismanagement, committed upon or near his premises, to the injury of others, if the conduct of the business which causes the injury is not on his account, nor at

his expense, nor under his orders or official control." (*Earle v. Hall*, 2 Met. 353.)

A distinction has been made between fixed and real property and personal chattels, in establishing the relation between master and servant, but that distinction is now abolished, except when the act complained of amounts to a continuing nuisance. (*De Forrest v. Wright*, 2 Mich. 372; *Hobbitt v. London & N. W. Railway Co.*, 4 Exch. 254; *Blake v. Ferris*, 1 Sel. 62, 63, 64, 65.)

Laird and Chambers, defendants in this case, neither owning nor occupying the land on which the dam was being erected, cannot be held responsible as proprietors for the negligence of those building the dam. The foundation of the common law responsibility not existing, the rule does not apply. (*Cessante ratione legis cessat ipsa lex*.)

By the common law, *sic utere tuo ut alienum non lædas*, is a maxim expressing an obligation, but that maxim being based upon the ownership of the soil, its application was not recognized by this Court, in the case of *Tenny v. The Miner's Ditch Co.*, (April Term, 1857, similar in some important particulars, to the present,) for the reason that both parties were upon the public lands. The refusal of the instructions last referred to, entitles defendants to a reversal of the judgment, and a new trial.

McConnell & Niles, and *A. A. Sargent*, for Respondents.

It is contended, we believe, by the appellants, that Laird and Chambers are not liable in these actions, because the work of erecting the dam was performed by Moore and Foss, under a contract—and for the additional reason that at the date of the breaking of the dam, it had not been completed nor accepted by them.

They place this supposed exemption from liability of Laird and Chambers, upon the following grounds, viz.:

1. Because the relation of master and servant did not exist between Laird and Chambers on the one hand, and Moore and Foss on the other.

2. Because Laird and Chambers exercised no control over the work during its progress.

3. Because the dam and reservoir, of which it formed a part, were situated on land belonging to the government.

4. As before stated, because the dam had not been entirely completed, and delivered over to Laird and Chambers at the time of the disaster.

In reply to the positions of the appellants, we advance the two following propositions, viz.: That the relation existing between Laird and Chambers, and Moore and Foss, was such as to render the former liable for the negligence of the latter, in respect to the building of the dam.

And also, that these cases do not depend so much upon the law, as to master and servant, as they do upon the more gen-

eral principle, that every man is liable for nuisances, or structures in the nature of nuisances, erected upon his [477] own property.

We now propose, in support of the first proposition, to take up, for the consideration of this Court, the various decisions rendered in this country and in England, which have a direct bearing upon the principle of *respondet superior*, and in so doing, shall briefly offer such comments as occur to us.

The first decision in point of time to which we shall refer is Lord Lonsdale's case (2 H. Black. 268-299). The principle can be gathered only from the pleadings, which are reported at length. From them it appears that the defendant Lord Lonsdale, owned certain coal mines, and contracted with another person to work them. The house of the plaintiff having been injured in consequence of the careless manner in which the mines were worked by the contractor, he brought an action against his lordship for the damages, and recovered judgment against him, which was affirmed on appeal to the House of Lords.

In *Stone et al. v. Cartwright*, 6 Term Rep. 411, it was held that an action for injury, caused by the negligent working of a coal mine, must be brought against the owner of the mine, or the immediate agents, by whose act the injury originated, and not against the intermediate contractor.

We shall next invite your Honors' attention to the leading case of *Bush v. Steinman* (1 Bos. & P. 402), and we do so with the greater confidence, because the opinion there rendered by the Court, besides the respect due to it as a precedent emanating from a very high source, is further recommended to our favor by the vein of strong logical reasoning which pervades it.

The defendant Steinman having purchased a house by the roadside (but which he had never occupied), contracted with a surveyor to repair it for a stipulated sum. A carpenter, having a contract, under the surveyor, to do the whole job, employed a bricklayer under him, and he (the bricklayer) again contracted for a quantity of lime, with a lime-burner, by whose servant the lime in question was placed in the road. The plaintiff and his wife, riding in a chaise, were overturned and injured by the heap of lime.

Here, it will be observed, that between the defendant and the person actually committing the wrong, viz., the lime-burner's servant—five several and independent sub-contracts intervened, viz.: the contract with the surveyor—the surveyor's contract with the carpenter—the carpenter's contract with the bricklayer—the bricklayer's contract with the lime-burner—and last, the lime-burner's contract with his servant. So far removed was the defendant from the act, that the Lord Chief Justice, who presided *nisi prius* during the trial, thought that no action would lie against him.

The Court of King's Bench, however, after mature deliberation and thorough argument, held, without a [478]

dissenting voice, that the owner of the house was liable, and judgment was rendered in accordance with that opinion.

If ever a principle was tested by an extreme case, it was the principle of *respondet superior* by this case of *Bush v. Steinman*. Indeed, it is scarcely possible to imagine a more extreme case. Yet the Court, acting upon the hypothesis that the defendant's own volition was the primary, if not the proximate cause of the injury, sustained the action against him.

He (defendant) set in motion the machinery—the chain of events—which finally resulted in the plaintiff's injury. Had he not owned the house and engaged the surveyor to repair, the lime would not have been placed where it would injure the plaintiffs.

By a reference to the opinions of the Judges, rendered *seriatim*, it will be seen that none of them formed their decision upon any technical relationship of master and servant, subsisting between the defendant and lime-burner's servant; but all take broader and bolder ground. The Chief Justice (ERLE) deduces the liability from the fact that the injury was done by persons working upon defendant's property; and goes on to declare, that "whether he (defendant) worked by his agents, by servants, or by contractors—still it was his work; and though another person might have contracted with him for the management of the whole concern without his interference, yet, the work being carried on for his benefit and on his property, all the persons employed must be considered as his agents and servants, notwithstanding any such arrangements, and he must be responsible to all the world, on the principle of *sic utere tuo ut alienum non lædas*."

In another portion of the same opinion, his Lordship adds: "Suppose, then, that the owner of a house, with a view to rebuild or repair, employ his own servants to erect a hord in the street (which being for the benefit of the public they may lawfully do), and they carry it out so far as to encroach unreasonably on the highway, it is clear that the owner is guilty of a nuisance, and I apprehend there can be but little doubt that he would be equally guilty if he had contracted with a person to do it for a certain sum of money, instead of employing his own servants for that purpose; for, in contemplation of law, the erection of the hord would equally be his act."

The learned Chief Justice concludes his opinion with the following striking and judicious remarks:

"The responsibility is thrown on the principal, from whom the authority originally moved. This determination is certainly highly convenient and beneficial to the public. When a civil injury of the kind now complained of has been sustained, the remedy ought to be obvious, and the person injured should [479] have *only to discover the owner of the house which was the occasion of the mischief—not be compelled to enter into the concerns between that owner and other persons, the inconvenience of which would be more heavily felt than any which can arise from circuity of action."

The concurrence of Mr. Justice HEATH in the judgment of the Court, is based upon the fact "that all the sub-contracting parties were in the employ of the defendant. It has been strongly argued, (he continued,) that the defendant is not liable, because his liability can be founded in nothing but the mere relation of master and servant. But no authority has been cited to support that proposition. Whatever may be the doctrine of the civil law, it is perfectly clear that our law carries such liability much further. Thus, a factor is not a servant; but being employed and trusted by the merchant, the latter, according to the case in *Salkeld*, is responsible for his acts." After referring to the case of *Tattersall*, the proprietor of a newspaper, who was held liable for a libel inserted in the newspaper, by persons employed by the owners under a contract to collect news and compose the paper, he proceeds, in a strain similar to that of the Chief Justice, to say, that "it is not possible to conceive a case, in which more mischief might arise, than in the present, if the various sub-contracts should be sufficient to defeat the plaintiff in his action. Probably he would not be able to trace them all, since none of the parties would give him any information; and consequently he might be turned around every time he came to trial,"

Mr. Justice ROOKE concurred with HEATH, J., and the Chief Justice, on the ground that "he who has work going on for his benefit and on his own premises, must be civilly answerable for the acts of those he employs." He then refers to a case in 2 *Levison*, where it was held that it would be intended by the Court, that a person having work going on for his benefit, has a control over all those persons who work on his premises; and he shall not be allowed to discharge himself from that intendment of law by any act or contract of his own.

We desire to remark, on this case of *Bush v. Steinman*, that it carries the principle of *respondet superior* much further than some of the more recent decisions seem inclined to follow it, and very much further than is required to sustain the case at bar. The original contract with the surveyor, was for repairing the house of defendant. It does not appear from the history of the case, that any necessity existed for placing the lime in the road, and it certainly was a very great stretch of the legal intendment, to say that the defendant Steinman, had in contemplation, at the time of making the contract with the surveyor, that in pursuance of the authority given by that contract, the lime-burner's servant would place the lime in the road. Indeed, it seems to us, that the most effective answer the [480] defendant could have made to the action, would have been, that the act of throwing the lime in the road was not so much a negligent as a willful act; and that therefore *quoad hoc*, the servant had acted without the scope of his authority.

In the case at bar, on the other hand, the contract between Laird and Chambers and Moore and Foss, contemplated, in express terms, the very act which occasioned the injury, viz.: the

building of the dam. That case would be more germane to the present, if the jury had been committed by means of the identical house which was the subject of the repairs, and by reason of such repairs. As for instance, suppose the house so repaired, or while in the process of repair, had, owing to the process of repairing, fallen upon and crushed the habitation of a neighbor. Then, in the estimation of all, including those Judges who dissent from the extreme doctrine of *Bush v. Steinman*, the owner would have been liable for the injury.

To take another instance for the sake of illustration: suppose some of the servants of Moore and Foss had placed the timbers used in the construction of the dam, in the road, so as to create an obstruction to travel, and a person is injured by such negligent act; then, according to the decision of *Bush v. Steinman*, Laird and Chambers would be liable for the injury—because, by legal intendment, the persons placing the timber in the road are acting as their agents or servants. But how much stronger and more convincing would be the reasons for the liability, provided the timber had been so placed in pursuance of an express contract between them and the persons doing the act? Yet this is exactly the case at bar.

Thus much for the present, as to the ruling in that somewhat celebrated decision.

In pursuance of the plan adopted, to review the principal reported cases having a bearing on this question, we shall next refer the Court to *Mathews v. The West London Water Works Co.* (3 Camp. 402), which, although a mere determination at *nisi prius*, is yet entitled to respect, because of the eminence and learning of the Judge (Lord ELLENBOROUGH) who made it.

It appears that the defendant (a corporation) had a contract with certain pipe-layers, to lay down pipes through the different streets of the metropolis, and that the pipe-layers hired the men actually employed to do the work. These men, in laying pipes in Tottenham Court Road, left a quantity of rubbish in the street, without any light sufficient to show it, or watchmen to warn passengers of their danger. The consequence was that the Liverpool coach, driven by the plaintiff, was overturned, his leg broken, etc. The question was, whether the action was properly brought against the water company instead of [481] the pipe-layers; and Lord ELLENBOROUGH said there was no doubt of the defendant's liability.

The same observation may be made on this case that we have made on the case of *Bush v. Steinman*, viz.: that it carries the defendant's liability further than is necessary to sustain the case at bar; for the accumulation of rubbish is collateral or incidental to the subject-matter of the contract—the pipe-laying.

The case of *Laugher v. Pointer*, 5 Barn. & C., 548 to 580, was as follows: The defendant, the owner of a carriage, hired a pair of horses from a stable-keeper to draw it for a day. The stable-keeper provided a driver for the horses, through whose negligence an injury was done to the horse of a third person. The

Court was equally divided as to defendant's liability. It will, we think, strike this Court, as it has ourselves, that the circumstances of this case bear but a slight analogy to those of *Bush v. Steinman*. Yet it is the case most relied upon by those who doubt the authority of that decision. It will be observed, however, that neither ABBOTT, C. J., nor Mr. Justice LITTENDALE, who deny the liability of the owner of the carriage, attempt to invalidate the general reasoning of *Bush v. Steinman*. They merely deny its applicability to the case then under consideration. Indeed, there could be no difficulty in deciding for the defendant, without unsettling a single principle embraced in *Bush v. Steinman*; for it was not the case of a person engaging another by contract to do a certain act, from the doing of which an injury resulted, but a mere arrangement by which the property and servant of one individual became, for a brief period of time, subject to the convenience of another—and to hold that other liable would not only, as a principle, contravene all our notions of justice, but would, as a rule, be far too inconvenient and impracticable for the daily purposes of life. For if the owner of the carriage, in the case cited, is liable, why not, as was very properly remarked by TINDAL, *arguendo*, hold the passengers in a stage-coach liable for an injury resulting from careless driving?

In *Smith v. Lawrence*, 2 Man. & R. 1, this point was again before the Court, and it was held that the owner of the horses and master of the postillions was liable to the owner of the carriage for an injury caused by careless driving.

The case of *Fenton v. The City of Dublin Steam Packet Co.*, 8 Adol. & El., 541 to 545, was a case of injury to a vessel from a collision with a steamboat. The boat was the property of the defendant, but had been chartered to Dails. The defendant, by the charter-party, reserved the right to furnish the crew of the boat, and did, in fact, furnish it. The Court held that the defendant was liable; but they do not decide that Dails, the charterer, would not also have been held liable had he been sued. On the contrary, they seem to admit the liability of both defend-^{*}ant and Dails; for Lord DENMAN remarks that [482] "the question is not whether the charterer is liable, but whether the owners, who have let him have the benefit of the vessel, are liable for the negligence of the servants whom they have put on board for him. It does not turn on that question. The charterer may be answerable also." And PATTERSON, Justice, declares, "it is not inconsistent to hold the hirer and letter both liable."

We first refer the Court to the cases decided in Massachusetts.

The case of *Earle v. Hall*, 2 Met. 356, was, in substance, as follows:

Hall, the defendant, had entered into an agreement with one Gilbert for the sale of a lot of land, upon which Gilbert was to erect, at his own expense and upon his own responsibility, a brick house. Hall agreed to make conveyance to Gilbert upon payment of the consideration money. Afterwards, Hall, having

received the consideration money, did actually execute the stipulated conveyance to Gilbert, who mortgaged the premises to some third parties to secure the payment of a debt to them. The workmen employed by Gilbert, while engaged in the preparatory excavations, dug out the earth under the wall of plaintiff's house, which adjoined the lot sold by Hall.

The decision of the Court is against the liability of Hall, but the reasoning adopted fully sustains the position assumed by us.

The Court, after referring to the principal English authorities, said :

"The general principle to be extracted from the cases, in regard to the use of real property, is, that the owner of real estate, either absolutely, or for the time being—he who has the management and control, and takes the benefit and profit of the estate—he at whose expense and on whose account the business is carried on—shall be responsible to third persons for the carelessness, negligence, or want of skill of those who are carrying on or conducting the business by which they are damnified; and this, whether the persons thus employed and engaged are working on wages or by contract—and whether they are employed directly by the principal or by a steward, agent, or manager, having the superintendence of his estate. Several principles of law seem to be referred to as the source of this responsibility. One is, that he who does an act by another, does it himself. Though not the work of his hands, it is the result of his will. His mind, his intent, and his purposes, are the efficient cause of the operations conducted by others. Therefore, it is he who, in the conduct of his own business, causes the damage complained of, and it is of him that redress shall be obtained."

Again, the Court said : "Another well recognized principle is, that every one shall so use his own property as not in the [483] man-agement of it to hurt that of another. Having the power to determine what agents shall be employed—what business shall be carried on upon the estate of which he has either the ownership or the enjoyment and possession—it is alike the dictate of justice and public policy that he shall be responsible for the conduct of those whom he may employ or dismiss, and whose movements he may have the power to direct," etc.

These remarks of that able bench, fully illustrate and explain the theory of our right of redress against Laird and Chambers.

The case of *Stone v. Codman*, 15 Pick. 297, is still more strongly in point for respondents than the foregoing case.

"The defendant employed a mechanic to make a drain for him, on his own land, and extending thence to a public drain; the mechanic procuring the necessary materials, hiring laborers, and charging a compensation for his services and disbursements."

By means of the drain-ditch, constructed in pursuance of this arrangement, water was let into plaintiff's cellar and destroyed certain of his goods, etc. The Court said :

"We are of opinion that if Lincoln, the contractor, was employed by the defendant to make and lay out a drain for him on his own land, and extending thence to the public drain, he, Lincoln, procuring the materials, employing laborers, and charging a compensation for his services, etc., he must be deemed, in a legal sense, to have been in the service of the defendant, to the effect of rendering his employer responsible for want of skill, or want of due diligence and care—so that, if the plaintiff sustained damage by such negligence, the defendant was responsible for such damage."

We will call attention to the case of *Yates v. Brown*, 8 Pick. 24, which, at first glance, may not seem strongly in point, as it concerns the navigation of ships; but which, for that very reason ought to be held the more conclusive; since it seems to be conceded that the rule for which we contend is less stringent in regard to personal than fixed property.

This was a case of collision of vessels. The defendant's vessel, while under the control of a pilot, ran into, and injured the ship of the plaintiff, through the negligence of the pilot. Chief Justice PARKER said:

"We think that the owners of a vessel, which by collision with another vessel, has caused damage through the fault or negligence of any one on board, is answerable to the injured party in respect of their property, notwithstanding there may be a pilot on board, who has the entire control and management of the vessel. It is more convenient that such owner should seek his remedy against the pilot whom he has for this service, than that the *injured party should; and it is more conformable to the general spirit of our laws." [484]

We conceive this to be a very pointed authority. The pilot is assuredly not a servant, in the strict, or even the ordinary sense of the term. He is as much a contractor, working by the job, as a builder who undertakes by contract to erect a house of certain dimensions, for a certain sum. The decision is really based upon broader principles than those controlling the relations of master and servant—upon principles of public policy and convenience, and upon the right of selection which belongs to the owners. As to this right of selection applied to pilots, we suppose, perhaps erroneously, that it extends to the right to elect whether the ship shall have any pilot or not; for pilots are, we believe, usually organized and controlled by statutory regulations which leave ship-owners no option as to the selection of any particular pilot, provided they have any at all.

The case of *Bailey v. The Mayor of the City of New York* (3 Hill, 532), was a case very strongly resembling the present in some of the leading circumstances of its history. The Legislature of the State passed a certain Act for the purpose of supplying the city of New York with pure water, in pursuance of which, a board of commissioners was appointed to carry the Act into effect. "The commissioners proceeded to enter into a con-

tract with Crandall and Van Zandt, whereby the latter agreed to build the dam in question according to certain plans and specifications thereto annexed; in pursuance of which contract the dam was constructed. Also, a bond was given by the said contractors, with sureties, to the defendants, conditioned that the contractors should well and faithfully perform their said contract."

The dam constructed in pursuance of this arrangement, having, by reason of its defective construction, broken away in a great and extraordinary flood, and destroyed a large amount of plaintiff's property; this action was brought against the city.

It was held by the Supreme Court, *nemine dissente*, that the commissioners appointed by the Legislature were *quoad hoc* servants of the city; and that, therefore, the city was responsible for their conduct, in having contracted with unskillful men to perform the work.

Upon error, to the Court for the Correction of Errors, the judgment was affirmed. (See *Bailey v. the Mayor of the City of New York*, 2 Den. 434 to 460.)

We shall next call the attention of this Court to the case of *Lesh v. The Wabash Steam Navigation Co.*, decided by the Supreme Court of Illinois, at the November Term, A. D. 1852.

In Judge STORY's work upon Agency, he assents to the modern modifications of the rule *respondeat superior*, which makes liability for injuries caused by another, depend upon the [485] right or *power of selection in the person sought to be charged. He does not refer to the case of a nuisance, erected upon a man's land by another, with the owner's consent. Indeed, a question of that character could scarcely, with propriety, come within the scope of a treatise on the law of agency.

But it is a noticeable fact that he refers to the case of *Bush v. Steinman*, as authority, (and of course, with some degree of approbation, at least,) in support of the proposition that "a principal is liable, not only for the misfeasance of his immediate agent; but also of one with whom the agent had contracted to do the work." (Story on Agency, Sec. 454.)

Now, are we to be told, with these facts appearing of record, and staring us in the face, that Laird and Chambers are not liable? That they are purged of their liability by their contract with Moore and Foss? If this be so, then a man engaging in a dangerous enterprise, has only to engage some bankrupt contractor and entrust the work to him. If it succeeds, well and good; if it fails, he is none the worse off. We repeat that this injury owes its origin to the will of the defendants Laird and Chambers; and to the authors of the evil, we ought in law and conscience, to look for reparation. Suppose that Moore and Foss had been sued by a third person in an action where the right to erect the dam came in question; would they not have invoked the aid of Laird and Chambers? And if they had been

mulcted in damages could they not have called upon Laird and Chambers to refund such damages to them?

A few words as to this doctrine of right of selection.

All authorities agree in holding that where the right to select the person who actually performs the labor exists in the defendant, he is liable for injuries arising from such work. This, we suppose, is the only real and tangible modification of the rule, in *Bush v. Steinman*, made by the late decisions. In all of the cases where this modification of the rule is applied, it will be seen that the injuries complained of, proceeded from the acts of sub-contractors, or their servants, and not from the acts of the immediate contractors. To illustrate the rule, and, at the same time, the exception, suppose that A., the servant of B., engaged C. to do B.'s work. C. is then the servant of B. But suppose that A., instead of being strictly a servant of B., takes the job from B. as a contractor, with an agreement to furnish materials and do the work in his own way; and then engages C. to do the work. C. is not a servant to B., because as to him B. had no right of selection or choice.

Now, if in such a case, the injury be done by C., the sub-agent or sub-contractor, B. should not be held liable, under some of the late authorities, unless the work comes within the other exception of being a nuisance on B.'s land.

But suppose the injury, instead of being committed by C., the *sub-agent, was the direct result of the act of [486] A., the contractor; B. would then be liable, because as to him, the right of selection was vested in B.

This conclusion is founded upon the obvious reason that as between the employer and the contractor, the right of selection exists in an equal degree, and with as great force as between master and servant. No man is compelled to employ another as contractor, any more than he is compelled to employ him as a servant. The man who contracts with a builder to erect a house, is in law and in fact, no more limited in his choice, than when he takes upon himself the superintendence of the building, and proceeds to work with the hired servants. The master who selects an incompetent or careless servant is liable for the injudicious exercise of his right. Why, then, should not the employer, who contracts with an unskillful contractor, be answerable for his improvident choice? Nay, we think that the weight of reason is in favor of holding the employer liable in such cases, rather than the master. For he who engages a contractor, voluntarily divests himself of the right to control and manage the projected work. It is his special duty to see that the person upon whom he confers powers so extensive, should be competent to discharge them in a skillful manner. It ought to be, and is, a maxim of law as well as of ethics, that the more extensive and important the duties to be performed, the more close and thorough should be the scrutiny into the qualifications of the person selected to perform them.

In what manner this fact is supposed to affect the main ques-

tion of Laird and Chambers' liability, we are at a loss to conjecture. The question is not, who owns the land, but who controls it? Because the liability does not depend on the ownership, but on the control which the defendant has of the property.

Judging from the exception tendered by the appellants in the Court below, we should say they entertained the opinion that no one could erect an actionable nuisance unless he had an estate of inheritance in the land.

Hitherto, in our folly, we have been accustomed to imagine that the absence of right in an individual, enhanced rather than diminished his legal liability. But we now perceive our mistake, and for the first time ascertain the logical correctness of what we have before esteemed a paradox; that a man's liability decreases in exact proportion as his right diminishes.

A party is entitled to recover damages for an injury to himself or property, in each of the following cases:

1. "Where the negligence of the defendant, in a suit upon such ground of action, is the proximate cause of the injury, but that of the plaintiff only remote, consisting of some act [487] or omission, not occurring at the time of the injury, the action is maintainable."

2. "Where a party has in his custody or control, dangerous instruments or means of injury, and negligently places or leaves them in a situation unsafe to others, and another person, although at the time even in the commission of a trespass, or otherwise somewhat in the wrong, sustains an injury thereby, he may be entitled to redress."

3. "When the plaintiff, in the ordinary exercise of his own rights, allows his property to be in an exposed and hazardous position, and it becomes injured by the neglect of ordinary care on the part of the defendant, he is entitled to reparation; on the ground that although in allowing his property to be exposed to danger, he took upon himself the risk of loss by mere accident, he did not thereby discharge the defendant from his duty of observing ordinary care, or in other words, voluntarily incurring the risk of injury by the defendant's negligence."

These three very obvious propositions are extracted from the notes to Hare & Wallace's edition of Smith's Leading Cases, where nearly all the law on the subject is collected and arranged. (Vol. 1, Hare & Wallace's edition of Smith's Leading Cases; notes to *Ashby v. White*, 365, edition of 1855.)

In addition, we shall cite the following cases: *Bird v. Holbrook*, 4 Bing. 628; *Platte v. Wilkes*, 3 B. and A. 308; *Walters v. Pfeil*, 1 Moody & M. 362; *Davies v. Mann*, 10 Mees & W. 546; *Lynch v. Murden*, 1 Adol. & El. N. S. 29; *Smith v. Dolsen*, 3 Man. & G. 59; *Bark Delaware v. The Osprey*, 2 Wall. Jr. 275; *Kerwhaker v. Cleveland R. R.*, 3 American Law Reg. 342; *Mayor of Colchester v. Brooks*, 7 Adol. & El. N. S. 333 to 386; *Cook v. The Champlain Nav. Co.* 1 Den. 92 to 104.)

FIELD, J., delivered the opinion of the Court—TERRY, C. J., concurring.

The only question necessary to consider for the determination of the appeal in this case, arises upon the refusal of the Court below to give certain instructions as to the liability of the defendants Laird and Chambers.

The action is brought to recover damages sustained by the plaintiffs, in consequence of the breaking of a dam or embankment constructed across Deer Creek, in Nevada county, by the defendants Moore and Foss, under a contract with the defendants Laird and Chambers. It appears from the evidence introduced on the trial, that in June, 1856, the defendants, Moore and Foss, entered into a contract with Laird and Chambers, by which, in consideration of the payment by the latter of certain moneys in the progress of the work, and the balance upon its completion. Moore and Foss bound themselves to construct at a designated *point on the creek, a dam or em- [488] bankment, of certain specified dimensions, with good and substantial materials, in a workmanlike manner, and capable of resisting all floods and freshets of the stream, for a period of two years, and to deliver it completed by a given time. The construction was commenced in pursuance of the contract, in July or August, 1856, and with the exception of an interval of some weeks in September and October, was progressed in, until February 14, 1857, when, being still incomplete, it was broken by a sudden freshet, and a large volume of water detained by the embankment, being thus loosened, rushed down the channel of the stream, carrying away and destroying, in its course, the store of the plaintiffs, with their stock of merchandise.

The defendants Moore and Foss are architects, and were at the time of the contract reputed to be experienced and skillful in their profession; and from the commencement of the work up to and including the time of the breakage, they had exclusive control over its construction. The defendants Laird and Chambers exercised no superintendence, gave no directions, furnished no materials, employed no hands, and although the time within which, by the contract, the work was to be completed had passed, they had never signified any willingness to waive the objection as to the time, and accept the same when completed.

On the conclusion of the testimony, the defendants' counsel requested the Court to give, among others, two instructions, which amounted in substance to this: that if the jury believed, in the construction of the dam under the contract, Moore and Foss acted under an independent employment, had the sole control of the work, and the manner of its building, the employment and management of the hands engaged thereon; and that Laird and Chambers had not received the dam from such contractors before it broke, and that the injury complained of occurred through the negligence and unskillfulness of Moore

and Foss, and their employees, the jury would find for the defendants Laird and Chambers. The Court refused the instructions, and at the request of the plaintiffs, charged the jury, "That if the defendants Laird and Chambers, employed the defendants Moore and Foss, to construct the dam referred to in the pleadings and evidence in this cause, at the point where the same was erected, and such dam gave way and broke, by reason of its unskillful construction, and an injury resulted therefrom to plaintiffs, then that the defendants Laird and Chambers, are liable in this action."

The Court below thus placed the liability of Laird and Chambers, for the injuries sustained, solely upon the fact that they contracted for the construction of the work, and held that this liability was not affected by the fact that they exercised no control or supervision over the work during its progress, or [489] that *Moore and Foss were independent contractors, to whose skill and judgment the construction of the work was entirely entrusted.

To determine the propriety of the instructions given and refused, it will be necessary to consider the principles upon which responsibility could attach to Laird and Chambers, and their application to the facts of this case. If liability exists on their part, it must arise either from their relation to the parties engaged in the erection of the structure, or from the character of the structure itself, independent of its construction.

The relation between parties to which responsibility attaches to one, for the acts or negligence of the other, must be that of superior and subordinate, or, as it is generally expressed, of master and servant, in which the latter is subject to the control of the former. The responsibility is placed where the power exists. Having power to control, the superior or master is bound to exercise it to the prevention of injuries to third parties, or he will be held liable. The responsibility attaches to the superior, upon the principle *qui facit per alium facit per se*. To determine the responsibility, therefore, it is necessary to ascertain whether the relation existing between the party charged and the party actually committing the injury, be in fact that of superior and subordinate, or master and servant. "Unless the relation of master and servant exist between them," said COLERIDGE, J., in *Milligan v. Wedge*, "the act of one creates no liability in the other." (12 Adol. & El. 737.) "The rule of *respondeat superior*," said the Court of Appeals of New York, in *Blake v. Ferris*, "as its terms imply, belongs to the relation of superior and subordinate, and is applicable to that relation, wherever it exists, whether between principal and agent, or master and servant, and to the subjects to which that relation extends, and is co-extensive with it, and ceases when the relation itself ceases to exist." (1 Seld. 48.)

By applying the test thus laid down to the relation existing between Laird and Chambers on the one hand, and Moore and Foss on the other, the question of liability will be easily solved.

The relation between them wants one of the most essential features of the relation between master and servant. Something more than the mere right of selection, on the part of the principal, is essential to that relation. That right must be accompanied with the power of subsequent control, in the execution of the work contracted for. In the present case, that power was wanting, and, of course, the relation to which it was essential did not exist. Laird and Chambers conceived the project of constructing a dam across a mountain stream, and applied to architects by profession, of reputed skill and experience, to carry the project into execution. A dam capable of effecting a certain result was contracted for; the mode of construction, the selection of materials, and the employment of hands, [490] were all entrusted to contractors, who, from their profession, were supposed to be much better qualified to judge of such matters than Laird and Chambers themselves. The relation between the parties was that of independent contractors; Laird and Chambers, on the one hand, contracting for a dam of certain dimensions and strength;—and Moore and Foss, on the other hand, contracting to construct and deliver such dam within a specified time, for a stipulated sum. To this relation the doctrine of *respondet superior* does not apply, as will be perceived by an examination of the recent decisions of the English and American Courts. In *Rapson v. Cubitt* (9 Mees. & W. 710), the defendant, a builder, was employed by the committee of a club, to make certain alterations at the club-house, including the preparation and fixing of gas-fittings, and he made a contract with one Bland, a gas-fitter, to perform this part of the work, in the performance of which, through the negligence of Bland, the gas exploded, and injured the plaintiff; and the Court held that the defendant was not liable. Lord ABINGER, C. B., said: "The injury was occasioned by the negligence of Bland, who did not stand in the relation of servant to the defendant, but was merely a sub-contractor with him; and to him the plaintiff must look for redress." And PARKE, B., said: "I am of the same opinion. The plaintiff has his remedy against Bland, whose negligence was the cause of the injury; if he attempts to go further, and to fix the defendant, it can only be on the ground of Bland's being the servant of the defendant; but then the obvious answer is, that Bland was only a sub-contractor, to do certain of the works, and that the relation of servant and master did not subsist between him and the defendant." In *Burgess v. Gray* (1 C. B. 50, E. C. L., Granger & Scott, 578), the defendant was proprietor of premises adjoining the highway, and employed one Palmer to construct a drain to communicate with the common sewer. Palmer employed workmen, who in the performance of the work placed a heap of gravel on the highway, in consequence of which the plaintiff in driving along the road was thrown from his cart, and sustained the injury for which the suit was brought. It was in evidence that Palmer had the entire control and management of the work, and employed workmen whom he paid, and charged

the defendant with the amounts paid; that the defendant had applied to the commissioners for leave to break into the sewer, and that the dangerous condition of the heap was pointed out to him by a policeman before the accident occurred, when he promised to remove it. The plaintiff obtained a verdict, and the defendant a rule nisi to enter a nonsuit; in deciding which, TINDAL, C. J., said: "If, indeed, this had been the simple case of a contract entered into between Gray and Palmer, that the latter should make the drain and remove the earth and [491] rubbish, and there had *been no personal superintendence or interference on the part of the former, I should have said it fell within the principle contended for by my brother BYLES, and that the damage should be made good by the contractor, and not by the individual for whom the work was done;" but on the ground that the evidence showed that the soil had been placed on the road with the defendant's consent, if not by his express direction, he was of opinion that the verdict should stand; and COLTMAN, J., said: "I think there was evidence enough to satisfy the jury that the entire control of the work had not been abandoned to Palmer," and the rule was discharged. In *Hobbitt v. The London and North-Western Railway Company* (4 Exch. 254), workmen employed by the defendants in constructing a bridge over a public highway caused the death of a person passing beneath, by negligently allowing a stone to fall upon him, and it was held that the company were not liable in an action by the administratrix of the deceased. In rendering the judgment of the Court, Baron ROSE said: "The liability of any one, other than the party actually guilty of any wrongful act, proceeds on the maxim, '*qui facit per alium facit per se*.' The party employing has the selection of the party employed, and it is reasonable that he who has made choice of an unskillful or careless person to execute his orders, should be responsible for any injury resulting from the want of skill, or want of care of the person employed; but neither the principle of the rule, nor the rule itself, can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury has been occasioned."

In *Knight v. Fox*, 5 Exch. 721, a railway company had contracted with A. to construct a portion of their line. A. contracted with B. to erect a bridge on the line, B. contracted with one Cockrane to erect, for a specified sum, a scaffold which had become necessary in the construction of the bridge, and to furnish the requisite materials, lamps, and other lights. In the erection of the scaffold, a portion was improperly projected upon the foot-path, owing to which, and the want of sufficient light, D. fell over it at night and was injured; and it was held that an action could not be maintained by D. against B. for the injury thus occasioned, and the plaintiff was nonsuited. On the rule to show cause why the nonsuit should not be set aside, Baron PARKE held. the rule should be discharged, and said the case was

"precisely the same as it would have been if the defendants had entered into a contract with some third party to perform that work." Baron ALDERSON was of the same opinion, and said, "that when that negligent act was occasioned by Cockrane, he was acting in the character of a sub-contractor, and that he did the work on his own individual account. The defendants took no part in the matter. The plaintiff's remedy was against Cock*-rane," and so the rule was discharged. In *Peachy* [492] v. *Rowland* (16 Eng. L. and E. 443), the defendants contracted with A. to fill in the earth over a drain which was constructed for them across a portion of the highway, from their house to the common sewer. A. having filled the drain, left the earth so heaped up above the level of the highway, as to constitute a public nuisance, in consequence of which the plaintiff, in driving along the road, sustained personal injury, for which he brought his action. A few days previous to the accident, and before the completion of the work, one of the defendants had seen the earth heaped up on a portion of the drain, but there was no evidence that either of the defendants had interfered with, or exercised any control over the work, and the Court held that there was no evidence to go the jury of the defendant's liability. The principle to be extracted from this decision is, that if a party be employed to do a lawful act, and in doing it he commit a public nuisance, his employer is not liable.

The decisions of the New York Courts are to the same effect, and express, with equal clearness, the distinction between the liability of an employer, when the relation between him and the employed is that of master and servant, and when it is that of independent contractors. In *Blake v. Ferris* (1 Seld.), the defendants had obtained permission from the authorities of the city of New York to construct a sewer, at their own expense, in a street of the city. One Butler was appointed by the street commissioner, an inspector of the work, and, as such, had charge of the sewer. He contracted with one Gibbons to furnish all the materials, and build the sewer in question according to the specifications of the street commissioner, and to provide proper guards and lights, at the excavation of the drain, for the prevention of accidents. In consequence of the negligent manner in which the sewer, while yet unfinished, was left open and unguarded in the night, the plaintiff's horses and carriage were driven into it, and for the injuries thereby occasioned, the suit was brought. Upon the close of the case, the defendant requested the Court to instruct the jury, in substance, that if the contractor, who was engaged in constructing the sewer when the accident happened, was exercising an independent employment, and the defendants did not interfere with the work, they were not liable; but the Court refused the instruction, and the plaintiff had judgment, and the case went to the Court of Appeals, where the judgment was reversed. In its opinion the Court said :

"When a man is employed in doing a job, or piece of work,

with his own means, and his own men, and employs others to help him, or to execute the work for him, and under his control, he is the superior, who is responsible for their conduct, no matter whom he is doing the work for. To attempt to make [493] the pri-*mary principal, or employer, responsible in such cases, would be an attempt to push the doctrine of *respondeat superior* beyond the reason on which it is founded."

In *Pack v. The Mayor, etc., of New York* (4 Seld. 222), the defendants had entered into a contract with one Foster to grade Bloomingdale road, and furnish materials for the same, in accordance with certain specifications. Foster made a contract with one Riley to do all the blasting of rocks required. In blasting, several fragments of rock were thrown into the house of the plaintiff, producing injury to his family and property; and it was held by the Court that the contractor Foster was not the agent or servant of the corporation, and that the city was not, in consequence, liable. JEWETT, J., in delivering the opinion of the Court, said:

"The doctrine is that a person who undertakes the erection of a building, or other work for his own benefit, is not responsible for injuries to third persons, occasioned by the negligence of a person, or his servant, who is actually engaged in executing the whole work under an independent employment, or a general contract for that purpose. Foster was such a contractor, actually engaged in performing his contract for the entire job, for whose negligence, or that of his servants, the defendants are not liable."

In *Kelly v. The Mayor of New York* (1 Kern. 432), it was held that the corporation, which had contracted with a person to grade a street, was not liable for damages occasioned by the negligence of the workmen employed by the contractor in performing the work. In that case, whilst the plaintiff was riding in the street, his horse was injured by the careless blasting of one of the workmen. The cases of *Blake v. Ferris*, and *Pack v. The Mayor, etc., of New York*, were cited as authority, and in referring to a clause in the contract that the work was to be done under the direction, and to the satisfaction, of certain officers of the corporation, the Court said:

"The clause in question clearly gave to the corporation no power to control the contractor in the choice of his servants. That he might make his own selection of workmen, will not be denied. This right of selection lies at the foundation of the responsibility of a master, or principal, for the acts of his servant, or agent. * * * As a general rule, certainly no one can be held responsible as principal, who has not the right to choose the agent from whose act the injury follows."

The doctrine laid down in this opinion as to the liability of Laird and Chambers is abundantly sustained by the authorities above cited. Their liability, so far as the injury complained of arose from the negligent and unskillful erection of the dam depends upon the question whether the relation between them and

Moore and Foss was such as to authorize a supervision and control in the execution of the work. If it authorized such super-*vision and control; if, in other words, it was that [494] of master and servant, they are liable. If, on the other hand, Moore and Foss, under the contract, were engaged in an independent employment in the construction of a work which was entrusted entirely to their skill, and over which no supervision and control were exercised by Laird and Chambers, the relation of master and servant did not exist, and the liability belonging to that relation did not attach. The instructions asked by the defendants' counsel were proper, and should have been given, unless a liability existed from the nature of the structure itself, independent of its manner of construction.

If the injury complained of arose, not from the manner in which the embankment or dam was constructed, but from the fact that it was constructed at all; that is, if it was a structure amounting to a nuisance, liability therefor would attach equally to Laird and Chambers, and the contractors, Moore and Foss. The authorities limit the liability to cases where structures amounting to nuisances are erected on or near and in respect to fixed property of the owner, and place the liability on the ground that every man is bound to so use and manage his own property as not to injure others. When the structure is erected by the permission of the owner, there is reason in limiting the liability to cases where the nuisance is placed on, or near, and in respect to his own property; but, where it is erected by his express direction, we can perceive no reason for the limitation. It is not the structure itself, but its character as a nuisance, that causes the injury and creates the liability.

In *Bush v. Steinman* (1 Bos. & P. 402), the defendant had purchased a house by the road-side, and contracted with a surveyor to repair it for a stipulated sum; a carpenter having a contract under the surveyor to do the whole business, employed a brick-layer under him, who contracted for a quantity of lime with a lime-burner, by whose servant the lime in question was placed in the road. The plaintiff and his wife, riding in a chaise, were overturned and injured by the heap of lime, and they brought their action against the defendant, and took a verdict, with liberty to the defendant to move for a nonsuit. In the decision of the motion, Chief Justice EYRE concurred with his associates in sustaining the verdict, but at the same time said, "I am ready to confess that I find great difficulty in stating with accuracy, the grounds on which it is to be supported. The relation between master and servant, as commonly exemplified in actions brought against the master, is not sufficient; and the general proposition that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do, seems to be too large and loose. * * * Where a civil injury of the kind now complained of has been sustained, the remedy ought to be obvious, and the person in-*jured should have only to discover the owner of [495]

the house which was the occasion of the mischief; not to be compelled to enter into the concerns between that owner and other persons, the inconvenience of which would be more heavily felt than any which can arise from circuity of action. Upon the whole case, therefore, though I still feel difficulty in stating the precise principle on which the action is founded, I am satisfied with the opinion of my brothers."

HEATH, J., founded his opinion on the fact that all the sub-contracting parties were in the employ of the defendant. "It has been," he said, "strongly urged that the defendant is not liable, because his liability can be founded in nothing but the mere relation of master and servant. But no authority has been cited to support that proposition. Whatever may be the doctrine of the civil law, it is perfectly clear that our law carries such liability much further."

BROOKE, J., placed his concurrence with Mr. Justice HEATH on the ground that "he who has work going on for his benefit and on his own premises, must be answerable for the acts of those he employs."

In *Laugher v. Pointer* (5 Barn. & C. 579), the defendant, who was owner of a carriage, hired a pair of horses to draw it, for a day, from a stable-keeper, who provided the driver, through whose negligent driving an injury was done to the horse of the plaintiff. The Court were divided as to the defendant's liability, LITLEDALE, J., in giving his opinion, commented upon the cases of *Bush v. Steinman*, and *Sly v. Edgley* (6 Esp., in which last case Lord ELLENBOROUGH followed, at *nisi prius*, the authority of *Bush v. Steinman*), and drew a distinction between the liability of a party for injuries resulting from the use of hired property, and injuries arising from the use and occupation of real estate. "And the rule of law may be," he said, "that in all cases where a man is in possession of fixed property he must take care that his property is so used and managed that other persons are not injured, and that whether his property be managed by his own immediate servants, or contractors, or their servants. The injuries done upon land, or buildings, are in the nature of nuisances, for which the occupier ought to be chargeable when occasioned by any acts of persons whom he brings upon the premises. The use of the premises is confined by the law to himself, and he should take care not to bring persons there who do any mischief to others. * * * But admitting these cases, the same principle does not apply to personal movable chattels, or to the permanent use and enjoyment of land or houses. * * * The use of personal chattels is merely a temporary thing, the enjoyment of which is, in many cases, trusted to the care and direction of persons exercising public employment, and the mere possession of that, when the care and direction of it [496] is entrusted to such persons who exercise public employment, and in virtue of that furnish and provide the means of using it, is not sufficient to render the owner liable." And Chief Justice ABBOT, in the same case, said: "Whatever is

done for the working of my mine or the repair of my house, by persons mediately or immediately employed by me, may be considered as done by me. I have the control and management of all that belongs to my land or my house, and it is my fault if I do not so exercise my authority as to prevent injury to another."

In *Quarman v. Burnett*, decided in 1840, (6 Exch. 499,) Baron PARKE, in delivering the opinion of the Court, drew the same distinction; but in *Reedie v. The London Northwestern Railway Company*, decided in 1840, (4 Welsb. H. & G., 254,) the Court of Exchequer held there was no such distinction, except in cases where the acts complained of amount to a nuisance. In this case, the counsel for the plaintiff argued that there was a recognized distinction between injuries arising from the careless or unskillful management of an animal, or other personal chattel, and an injury resulting from the negligent management of fixed and real property; but Baron ROLFE, in delivering the opinion of the Court, after alluding to the distinction noticed by LITTONDALE, J., in *Laugher v. Pointer*, said: "But on full consideration, we have come to the conclusion that there is no such distinction, unless, perhaps, in cases when the act complained of is such as to amount to a nuisance; and, in fact, that according to the modern decisions, *Bush v. Steinman*, must be taken not to be the law, or, at all events, that it cannot be supported on the ground on which the judgment of the Court proceeded. * * *

It remains only to be observed that in none of the modern cases has the alleged distinction between real and personal property been admitted. In *Milligan v. Wedge*, Lord DENMAN expresses doubt as to the existence of such a distinction, in any case; and in the more recent case of *Allen v. Haywood*, the judgment of the Court proceeded expressly on the ground that the contractor, in a case like the present, is the only party responsible."

The doctrine laid down in this last case appears to us to be founded in good sense; and it follows from it that the distinction, as to the liability of a party, when he engages a contractor to erect structures on his own premises, and when he engages such contractor to erect them on the premises of another, does not rest on any just principle. If the enterprise undertaken be a lawful one, and be entrusted to competent and skillful architects, there is no just reason why liability should attach to the projector, for injuries occurring in its progress, any more if such enterprise be executed on his own land, than if executed elsewhere. If a man, wishing to build a house for his own use, upon his own premises, lets it out by contract to an architect, who is *to provide all materials, and deliver it [497] completed; upon no just principle should his liability be greater than if he undertook the building of a similar house upon his neighbor's property, and let it out by contract in the same way. If the structure amount to a nuisance—if the injury complained of arises, not from its negligent or unskillful construction, but from the fact that it is constructed at all—then liability would attach, whether the erection be made under his

own supervision and control, or let out by contract to others. To illustrate this position—if the owner of land erect a dam, or permit a dam to be erected, across a stream running through his property, by which his neighbor's land is flooded, he is liable for damages; for the injury results, not from the manner in which the dam is erected, but from the fact that it is erected at all. He has used, or permitted his property to be used, to the injury of others, and must be responsible. But if no injury follows from the dam itself, and its construction is let out by contract, there is no reason why the owner should be responsible for injuries arising from the negligence or unskillfulness of the contractors, during the progress of the work, from the fact that it is a structure upon his own land, if such liability would not attach to him, if the structure were on the land of another.

We have examined the authorities in the Massachusetts Reports, cited by the learned counsel of plaintiff in his very able brief, and also the case of *Bailey v. The Mayor of New York*, in 3 Hill and 2 Den. The Massachusetts cases follow the older English decisions, and in *Lowell v. Boston & Lowell Railroad Corporation*, 23 Pick. 24, the Court cite *Bush v. Steinman*, with approbation, and say, "this decision is fully supported by the authorities cited, and well established principles." The question involved in the case at bar does not appear to have been discussed in Massachusetts in the light of recent English decisions.

In the case in 3 Hill, and 2 Den., the corporation of New York was held responsible for injuries occasioned by the negligent and unskillful construction of a dam on the Croton River, which was a part of the works built for supplying the city with pure water. In that case it would appear that the dam had been completed and accepted by the corporation. By its acceptance and subsequent use, the corporation assumed the responsibility of the work, and virtually guaranteed its strength and capability to protect against injuries. To third parties it then became liable, and although the Chancellor in his opinion does not mention in terms the acceptance of the dam, yet this fact must have had a controlling influence on his judgment, for he places the liability of the city expressly on the ground that *the dam was the property* of the corporation, and that the corporation was bound to see that it was not used by any one so as to become noxious to the occupiers of property on the river below; and concluded [498] by *saying, "and upon that ground, though I confess with some hesitation, I shall assent to the affirmance of the judgment of the Court below." In *Blake v. Ferris*, already cited, which was decided nearly six years after the case of *Bailey v. The Mayor, etc., of New York*, the Court, in reference to *Bush v. Steinman*, observes that it was followed by Lord ELLENBOROUGH at nisi prius in the case of *Sly v. Edgley*, (6 Esp. 6.) but was believed never to have received the sanction of an English Court. In *Laugher v. Pointer*, its authority in reference to the case before the Court was denied, and the correctness of the principle on which it was founded doubted by LITTEDALE, J., and in

Quarman v. Burnett, and *Rapson v. Cabitt*, it was held inapplicable to those cases, and in *Reedie v. The North-Western Railway Company* it was held not to be law, or at all events that it could not be supported on the ground in which the judgment proceeded, and the Court concludes its opinion by stating that upon examination it appeared that the main proposition of that case was not law in England or in New York.

The recent decisions of England and of New York appeared to us to be sustained by sound reasoning, and to place the liabilities of parties upon just principles; and we only advance one step further in the same direction, following the same reasoning, in holding, as we do, that the liability of Laird and Chambers is not affected by the question whether they were the owners or not of the land where the dam in question was located.

For injuries occurring in the progress of the work before its completion and acceptance, the contractors alone were responsible to third parties, the defective construction which caused the injury not being inherent in the original plan contracted for. If the mode and manner which constituted the defect by which the injuries complained of were occasioned, had been inherent in the plan, and this plan had been devised by Laird and Chambers, which the contractors were simply engaged to carry out, then liability would attach to Laird and Chambers, for injuries occurring in its progress, as well as afterwards. But this is not pretended. If the injuries complained of had been occasioned after the completion of the dam by the contractors, and its acceptance by Laird and Chambers, there can be no doubt of the liability of the latter. Parties for whom work contracted for is undertaken, must see to it before acceptance, that the work, as to strength and durability, and all other particulars necessary to the safety of the property and persons of third parties, is subjected to proper tests, and that it is sufficient. By acceptance and subsequent use, the owners assume to the world the responsibility of its sufficiency, and to third parties the liability of the contractors has ceased, and their own commenced. In the present case the damages are, in fact, claimed for the negligence and unskillfulness of the work of the contractors before *its com- [499] pletion and acceptance, and it is sought to fasten a liability for such damages upon Laird and Chambers, from the fact that it was in their mind that the undertaking originated, and it was their volition which set that undertaking into execution. If these reasons are sufficient to charge them, then upon the same principle no enterprise requiring for its execution the skill, learning, and knowledge of professional men, could be undertaken, without risks on the part of the original projectors, which no prudent man would take.

It follows that, as the case stands before this Court upon the record, the liability of Laird and Chambers must depend upon the character of the relation between them and Moore and Foss, and the refusal of the instructions based upon that relation, was error, for which a new trial must be had.

Judgment reversed, and cause remanded.

HOUSE v. KEISER.

FORCIBLE ENTRY AND UNLAWFUL DETAINER—STATUTE, HOW CONSTRUED.—

The statute concerning forcible entry and unlawful detainer, must be strictly construed.

1 IDEM.—WHAT POSSESSION REQUISITE.—A mere scrambling or interrupted possession is not sufficient to maintain the action, but it must be actual, peaceable and exclusive.

IDEM.—ACTION BY WHOM.—This action can be maintained by the person ousted; his grantee cannot maintain the action.

APPEAL from the County Court of Placer County.

Action of forcibly entry and unlawful detainer, brought by plaintiff, House, before a justice of the peace, against Samuel and Jacob Keiser. Judgment for defendants, and plaintiff appeals to the County Court, where a trial *de novo* is had, and judgment rendered for plaintiff, and against defendant, Samuel Keiser, for the possession of the premises, and treble damages. Defendant moves for a new trial, which being denied, he took this appeal.

The evidence on the trial in the County Court shows, that Samuel Keiser had used a portion of the premises in dispute, about two months before plaintiff's purchase, and claimed the whole under an execution sale of the premises, as the property of one Morrison, through whom plaintiff derived his title. And at the time of the sale to plaintiff, defendant had then plowed and sowed a small portion of the premises.

Thomas & Meyres, for Appellant.

House was not peaceably in actual possession at the time of the alleged entry. He alleges that he took possession on the 23d of April, 1856, but the evidence shows that defendant was then in possession, and had been from the 18th of [500] *February preceding, and that plaintiff's temporary possession, which he usurped on the day before the alleged entry, was opposed, disturbed and obstructed by defendant, who claimed the ground and held the claim adversely. Defendant was in actual possession, and plaintiff attempted to oust him, and hence the threats, force, etc.

Defendant did not forcibly enter, which should have been shown. (*Frazier v. Hanlon*, decided in this Court, July Term, 1855.)

Defendant entered on the 18th of February, 1856, and held peaceably (notwithstanding plaintiff's alleged possession on 23d April), till the day before the difficulty. He then objected to plaintiff's cutting and taking the grain away, and plaintiff left with half a load. Next day, defendant was on the inside of the fence, or enclosure, and held his possession, which he had a right to do; for he purchased the premises on the 18th of Feb-

1. Cited *Dickinson v. Maguire*, 9 Cal. 48; *Cummings v. Scott*, 20 Cal. 84. Approved *Hoag v. Pierce*, 28 Cal. 191. Cited *Valencia v. Couch*, 32 Cal. 344.

ruary, 1856, at sheriff's sale, and took possession, and the time for redemption had expired before the trial. (9 Cow. 687.)

There was no evidence to show the plaintiff was peaceably in the actual possession at the time of the alleged entry; nor that defendant forcibly entered; nor that waste and injury were done to the premises; nor that the rents and profits were of any value, and a nonsuit should have been granted. (1 Cal. 108.)

Title to the land was necessarily involved, and ejectment was the proper action.

Crocker & Robinson, for Respondent.

This was an action for forcible entry and detainer. There is no objection to the pleadings.

The questions of force and possession have been passed on by the jury, and there is evidence sufficient to sustain the verdict.

Section 12 of Forcibly Entry Act (Cod. S.), 170, gives damages for waste and injury, as well as rents and profits.

In this case, the growing crops were taken. The word "injury" would fully include that as damage. (Webster's Dictionary, word "injury.")

Rents and profits would also cover the crops, and it is not necessary that waste alone should accrue.

The statute requiring the verdict to find the monthly value, is only directory, and does not injure the defendant, if not found. No one but the plaintiff could find fault.

The proceedings commenced in a Justice's Court, and will not be so strictly construed, as in a high Court. (*Barnes v. Stark*, 4 Cal. 414-15; Statutes 1856, p. 134, subdivision 9; *Cronise v. Carghill*, 4 Cal. 120; *Hernandez v. Simon*, 4 Cal. 182; *Ward v. Cooney*, July T., 1854.)

There was no effort to raise the question of title in this case, *except by defendant, who set up and tried to [501] prove a title by virtue of a sheriff's sale, which was wholly inadmissible.

If he has any rights, he must bring a proper suit and test his right. He cannot take possession by force, or peaceably. (*People v. Godefroy*, 1 Hall, Supreme Court New York, 245, and authorities cited; *People v. Nelson*, 13 J. R. 40; 8 Cow. 226; *Jackson v. Fuller*, 4 J. R., 215; *Lane v. Gaskins*, Jan. T., 1854.)

TERRY, C. J., delivered the opinion of the Court—FIELD, J., concurring.

The statute "concerning forcible entry and unlawful detainer" is in derogation of the common law, and must be strictly construed. A party, therefore, who desires to avail himself of the summary remedy provided by this act, must bring himself clearly within its provisions. He must show a possession, actual, peaceable, and exclusive; a mere scrambling or interrupted possession, or the exercise of casual acts of ownership over the premises, is not sufficient.

The record in this case does not show such possession in the plaintiff—on the contrary, the evidence raises a strong presumption that defendant's entry was made before plaintiff's right of possession accrued; and it is well settled that this action, being for injury to possession, can only be maintained by the person who was in actual possession at the time of the entry, and not by his grantee, or reversion.

Judgment reversed.

BREWSTER ET AL V. BOURS ET AL.

¹ **TRIAL OF SPECIAL ISSUES IN CHANCERY CASES.**—Special issues, framed by the Court according to the established rules of chancery practice, may be tried by a jury in equity cases.

INSOLVENCY—PRIORITY OF ATTACHMENTS.—Where G. & Co., concealing their insolvency, obtained an extension from their creditor B., and before the maturity of the notes, B. apprehending that G. & Co. would fail before their paper became due, and that the other creditors of G. & Co. would exhaust their assets by attachment—obtained, by an arrangement with G. & Co., an ante-dated note for the amount due him at the date thereof by G. & Co., on which suit was commenced by attachment, and a levy made upon the property of G. & Co.: *Held*, that B's attachment and claim was valid against subsequent attaching-creditors, the case not being one either of actual or constructive fraud.

PAYMENT BY NOTE, EFFECT OF.—Giving a promissory note, payable at a future time for a pre-existing debt, does not discharge it. Its only effect is to suspend the right of recovery until the maturity of the note.

APPEAL from the District Court of the Fifth Judicial District, County of San Joaquin.

This was a proceeding in equity to set aside a judgment on the ground of fraud. The case was tried below by a [502] jury, who rendered a verdict in favor of the defendants, and this appeal is taken from an order refusing a new trial.

This case is sufficiently stated in the opinion of the Court.

Hall & Huggins, for Appellants.

The Court below erred in refusing the application of the complainants for a direction by the Court to the jury to find a special verdict presenting the facts established by the evidence.

The allegations of the complaint and the nature of the relief sought, show that this case is addressed exclusively to the chancery powers of the Court. It is nothing more or less than a bill in chancery to set aside a judgment obtained at law, on the ground that the judgment is fraudulent and void as against the complainants.

The latter parties, as well as the defendants, Bours & Co., are all creditors of the defendants, Gillingham & Co. The complainants seek, by the aid of the equity jurisdiction of the Court, to vacate a judgment by default against the common debtors in favor of Bours & Co. for five thousand three hundred and eight y-

1. Cited *Patterson v. Downer*, Cal. Sup. Ct., Jan. T., 1870, not reported.

six dollars, with interest and costs; and also to vacate the note and other proceedings on which the judgment is founded, which judgment and the pretended lien acquired by the suit and proceedings of Bours & Co., as the complainants claim, should be annulled, and the complainants let in to take precedence by virtue of judgments recovered by them, binding the same property.

This Court have decided, in *Sedgwick v. Walker*, and *Cahoon et al. v. Levy et al.*, 5 Cal., that in chancery cases the parties have no right to demand a trial by jury; and even when issues are submitted at the instance of the Chancellor to be determined by a jury, the Court say, in *Gray v. Eaton*, 5 Cal., that he is not bound by their finding, and "in his decree he may be governed by it, or he may disregard it." (*Cunningham v. Freeborn*, 11 Wend. 251.)

The appellants contend that the judgment in favor of Bours & Co. should be set aside, because the note on which the judgment was founded, as well as the judgment itself, were given and suffered "with intent to hinder, delay, or defraud" the complainants, being at the said several times creditors of the said Gillingham & Co. (Act concerning fraudulent conveyances, etc., Compiled Laws, p. 202, sec. 20.)

The facts, as they appear in the record to have been either admitted in the answer, or proved by the evidence, are proof *per se*, of the intent specified in the statute, and in judgment of law render the transaction between Bours & Co. and H. W. Gillingham, of the 6th October, fraudulent and void, as against the complainants.

The Supreme Court of this State, so far from disturbing the *well known classes at common law of frauds, actual [503] and constructive, have *ex industria*, adhered to the old rule of their creation, notwithstanding the legislature of the State would, *prima facie*, seem to have resolved upon its abrogation and the inauguration of a new principle. In *Billings v. Billings* the Court judicially construes the twenty-third section of the act above quoted, so as to bring its operation into harmony with ancient principles governing this subject. (2 Cal. 113, 114; Id. 339.)

The Court use, in the case first above quoted, the following language:

"Although the question of fraudulent intent is made a question of fact in all cases under the section above quoted, yet whenever the law declares that certain *indicia* are conclusive evidence of fraud, a verdict against such evidence should in all cases be set aside."

Where such act must necessarily hinder or delay other creditors, the law adjudges the intent to be fraudulent, no matter what the real motive may have been; and in cases occurring under the statute like the twentieth section of our own Act, Courts of Chancery have said that the law at once supplies the intent, and declares it to be the prohibited and invalidating in-

tent, in the contemplation of the statute. (*Cunningham v. Freeborn*, 3 Paige, 564; *Id.* in Court of Error, N. Y. 11 Wend. 253; *Burk v. Sherman*, 2 Doug.—Mich.—176.)

And this strict doctrine rests for its justification on the common sense rule that a party must be taken to intend what he knows will be the natural and necessary consequences of his own acts—a rule which, though more frequently found useful in a widely different branch of the law, is nevertheless equally availing in Courts of Chancery in the solution of intricate and important questions there so constantly arising on this peculiar subject of its jurisdiction.

D. W. Perley, for Respondents.

If the note held by Bours was for a *bona fide* debt, and fairly and honestly made, then there can be no just pretense for disturbing the judgment.

If the note was fraudulently procured by Bours, and with intent to delay, hinder, and defraud the plaintiffs, then the judgment ought to be reversed.

The general question, then, is, was that note held by Bours & Co., fraudulently made by Gillingham & Co., and fraudulently procured by Bours & Co.?

It might be, and perhaps is, a sufficient answer to the question to say that every fact which tends to show or establish fraud, was directly submitted to the jury, under instructions by the Court, and the jury, upon this point, found for the defendants.

[504] *The charges of fraud were completely negatived, and the perfect propriety of the instructions, given at the request of defendants, is not questioned.

On principle and authority both, then, the appellants ought not, if the verdict of the jury is to have any consideration at all in this Court, to be allowed to go behind it.

It is manifest that dating the note on the first instead of the sixth neither prejudiced any rights of the plaintiffs, nor operated any advantage to Bours. If the note had been dated on the sixth, Bours could as well have attached on that as on one dated on the first.

The note was evidently dated on the first, in order to show the exact state of the demand on that day.

The question now is, did the taking of the two notes on the first, from Gillingham, extinguish the antecedent liability.

If it did not, then the existing indebtedness was a good consideration to support a note made on the sixth, or Bours might have surrendered the old notes and sued on the original cause of action.

The respondents contend that taking the two notes on the first was no payment of the existing debt, and did not extinguish that liability.

The case of *Cole v. Sackett*, 1 Hill, 516, is a case in point. Judge COWEN says:

"It is entirely settled that a promissory note of the debtor in no way affects or impairs the original debt, unless it be paid."

"The creditor may recover on the original consideration, surrendering or canceling the note at the trial."

And the doctrine holds, even where it was expressly agreed that such note was taken in full satisfaction of the original debt.

TERRY, C. J., delivered the opinion of the Court—BURNETT, J., and FIELD, J., concurring.

On the trial the plaintiffs moved that the jury be instructed to find a special verdict, setting out all the facts in the case as disclosed by the testimony. The Court held that in cases where a special verdict was desired, the proper practice was to frame issues, stating separately each point in controversy, and directed such issues to be framed and submitted to the jury. Plaintiff's counsel objected to this mode of proceeding, and declared that they would prefer a general verdict, and no objection being made by the defendants, a general verdict was returned.

The appellants now insist that the ruling of the Court on this point was erroneous, that the special verdict provided for in the Practice Act is as distinct from special issues as from a general verdict. That "it resembles somewhat the taking of depositions in chancery under an order to an examiner, or master, *but differing from these, and commending itself, [505] therefore, to favor in this, that the certified result is not encumbered with the tedious details of every interrogatory, and the exact words of the witness spoken in reply; that the Practice Act meant to obviate the objectionable incidents of the old system, secure the privilege of a jury trial in every case as far as consistent with the rules and practice of Courts of Equity; and whilst it avoided the framing of numerous special issues in certain cases, presented all the information derivable from that proceeding in a form much more connected and intelligible."

This point is not well taken. The mode of proceeding contended for by the appellants is, we think, impracticable; that in complicated cases, it would be next to impossible to find a jury capable of passing, understandingly, upon the various questions of fact involved, without the aid of special issues, and that the statute contemplates, that in all such cases, special issues should be framed under the directions of the Court, according to the long-established rules of chancery practice. The case at bar was a proper one for a special verdict; but as the failure to present the issues was the result of plaintiffs' own motion, they cannot be allowed to take advantage of it.

It remains only to inquire whether the allegations of fraud in plaintiffs' complaint are sustained by the evidence.

The record shows that Gillingham & Co., traders in Stockton and San Francisco, were, on the 1st day of October, 1856, insolvent, but that this fact was known only to themselves; that,

at this time, they were indebted to Bours & Co. in the sum of five thousand three hundred and eighty dollars, for money before that time advanced; that Gillingham, concealing the fact of his insolvency, obtained from Bours an extension of the time of payment, and pursuant to this arrangement, executed two notes, one payable on the 13th of October, and the other thirty days after date. On the evening of the 6th of October, Bours, knowing that Gillingham & Co. had failed, and apprehending that their property would be attached, and wholly consumed by other creditors, before the maturity of his notes, called on Gillingham, and requested that he would confess judgment for the amount of his debt. To this, Gillingham consented; but at the suggestion of Bours' counsel, in lieu of the confession of judgment, he gave a note payable on demand for the amount which was due Bours on the 1st day of October; that this note was dated on the 1st of October, and that on the day it was executed suit was commenced upon it, and attachment was levied on Gillingham's property; that Bours knew at this time that Gillingham & Co. were insolvent, and that his object in taking a note on demand was to enable him, by attachment, to obtain priority over other creditors; that plaintiffs are creditors, [506] having attachments subsequent to Bours', *and that the amount of property attached is not more than sufficient to satisfy Bours' demand.

We are not able to perceive any fraud in this transaction. The evidence shows an entire absence of any fraudulent intent on the part of the defendants, and we are clearly of opinion that the facts disclosed by the record do not constitute legal or constructive fraud. The argument that the effect of the proceedings was to hinder and delay other creditors, would apply with equal force to every proceeding by attachment against a debtor, whose assets were not sufficient to discharge all his liabilities.

Bours & Co. sought to recover only the sum which was justly due to them; relying on the representations of Gillingham, and ignorant of his circumstances, they had agreed to give time for the payment of their debt; discovering the true state of facts, they took such measures as were thought necessary to restore them to the position which they before occupied; to this end they took a note, on demand, for the precise amount of their antecedent debt, which was a sufficient consideration for the note.

The acceptance of a note payable at a future time for a pre-existing debt, does not extinguish the debt, its only effect is to suspend the creditor's right to recover until the maturity of the note, when he may surrender or cancel the note and proceed on the original consideration. (2 Am. Lead. Cases, 182.) See also *Toby v. Barber* (5 Johns. 73), where the Court hold, that "it is a rule well settled and repeatedly recognized in this Court, that taking a note, either of the debtor or a third person, for a pre-existing debt, is no payment, unless it be expressly agreed to take the note as payment, and run the risk of its being paid, or unless the creditor parts with the note, or is guilty of some

laches in not presenting it in due time. He is not obliged to sue on it, he may return it when dishonored, and resort to his original demand. It only postpones the time of payment of the old debt until default is made in the payment of the note."

The rights of the plaintiffs were not, as we conceive, injuriously affected by the execution of the note on demand. Bours' debt was wholly due on the 1st of October, was not extinguished by the execution of the notes at that time, and his consent to extend the time of payment had been procured by a concealment on the part of Gillingham & Co. of the fact of their insolvency. Under these circumstances, Bours could have surrendered the notes, and proceeded directly upon the original indebtedness.

This view of the case renders it unnecessary to notice in detail the errors assigned by the appellants upon the instructions refused by the Court.

Judgment affirmed.

*IN THE MATTER OF BUCHANAN'S ESTATE. [507]

¹ **HUSBAND AND WIFE, COMMON PROPERTY.**—Property in this State, acquired by the husband after marriage, but before the passage of the Act of April 17th, 1850, is common property under the Mexican law, as that so acquired subsequently is by the statute, and cannot be disposed of by will.

DESCENT, POSTHUMOUS CHILD.—A posthumous child, for whom no provision is made in the will of the father, is entitled to one half of the separate and common property, where no express intention of the testator to the contrary appears.

² **HOMESTEAD, RIGHT OF SURVIVORSHIP.**—The homestead being held in a sort of joint-tenancy, passes, on the death of the husband, to the wife, by right of survivorship, and forms no part of the common property.

APPEAL from the Probate Court of Yuba County.

The deceased, Robert B. Buchanan, died in June, 1855, leaving property, real and personal; some of the real estate having been acquired before, and a portion after, April, 1850. The property, both real and personal, was acquired during marriage. At the time of his death, he left a widow, but no children. A posthumous child of the deceased was born in January, 1856. The deceased left a will, by which he bequeathed a portion of his property to his wife, and the remainder to his relations. No provision was made in reference to the posthumous child. The widow refused to take the legacy under the will, but claimed, before the Probate Court, one half the community property, after the payment of the testator's debts. The Court made a decree allowing her one half the property acquired after the 17th of April, 1850, but held the property acquired previous to that time, as subject to the disposition of the husband.

1. Cited *Smith v. Smith*, 12 Cal. 225; *Scott v. Ward*, 13 Cal. 400.

2. Construed *Gimny v. Doane*, 22 Cal. 638. Cited *Brennan v. Wallace*, 25 Cal. 114.

The decree further allowed the child the one half of the real property left by the deceased, after paying the debts of the estate. It further ordered that the debts be paid out of the separate property, (that acquired by deceased before April 17, 1850;) and, inasmuch as the executor had paid a large sum from the proceeds of the common property, for debts and expenses of the estate, it further ordered a sale of the separate property, (reserving the homestead to the widow,) and that out of the proceeds of the sale, he pay the sum before so expended out of the proceeds of the common property, to the widow and child in equal portions, and out of the balance that he pay the legacies made by the will.

The widow, and the guardian of the child, appealed from those portions of the decree deciding any portion of the estate to be the separate property of the deceased, and ordering a sale thereof, and appropriation of proceeds.

Field, for Appellants.

[508] *1. So far as the rights of the posthumous child of the testator are concerned, it is of no consequence whether the property of which the deceased died possessed be common or separate property, for, in either case, the child is entitled to one half. (Sec. 16 of the Act concerning wills, Comp. Laws, 143.)

By the first section of the Act of Descents and Distributions, the estate of an intestate, not otherwise limited by marriage contract, descends, where there is a surviving wife, and only one child, in equal shares, to such wife and child.

It is evident, therefore, from the above, that so far as the child is concerned, it is of no moment, whether the property of the deceased is common or separate property. She is entitled to one half, and so the Court below finds, as a conclusion of law, and yet the conclusion is overlooked in the decree, where the executor is ordered to sell all the real estate situated in San Francisco and Yuba counties, excepting the homestead and certain lots in Marysville. It should have directed the sale of one undivided half of that property if it directed a sale at all. In this particular the decree should be modified on the appeal of the guardian.

2. The Probate Court erred in adjudging that the property of which Buchanan died possessed, which he acquired in California after his marriage with Minerva E. Haun, and previous to April 17, 1850, was his separate property, and could be disposed of by will, and that the same did pass under his will and testament, subject to the payment of his debts, and to the rights of his subsequent born child.

The civil or Mexican law, so far as it relates to the rights of husband and wife, as to property acquired, by either, during the existence of the community, was not repealed, except by the Act of April 17, 1850, and then only by necessary implication. It was directly repealed April 22, 1850. What, then, was

the civil or Mexican law, in force in California on this subject, previous to our Act of April 17, 1850?

Our statute was a re-enactment of the Spanish or Mexican civil law, on the subject of the rights of husband and wife, and our Supreme Court have so intimated. (See *Panaud v. Jones*, 1 Cal. 513; *Haines v. Castro*, 5 Cal. 111.)

If the property acquired in California previous to April 17, 1850, was common property, it could not be disposed of by will.

On this point I cite, as authority, *Beard v. Knox*, 5 Cal. 257.

The appellants, therefore, ask this Court to adjudge and declare that all the property, real and personal, of which Robert B. Buchanan died possessed, which was acquired by him in the State of California, after his marriage, was common property, one half of which, upon his death, passed to his surviving wife, Haun, and the other half to his child, subject only to the payment of his debts; and that the same could not be [509] disposed of by him by will, and that the last will and testament of the deceased did not operate upon said property.

Charles Lindley, for Respondents.

It is contended by respondents that all the property acquired before April 22, 1850, must be disposed of under the will.

The American emigrants brought with them to California the common law, in the same manner that our ancestors brought it from England to America. (*Fowler v. Smith*, 2 Cal. 39.)

If this proposition be true, the property must be disposed of under the will.

If the above is not true, then it must depend upon the statutes and decrees of Mexico, and not upon the civil law. The civil law is not in force in Mexico, any further than adopted by legislative power. (*Panaud v. Jones*, 1 Cal., and authorities there cited.)

BURNETT, J., after stating the facts, delivered the opinion of the Court—TERRY, C. J., concurring.

So far as the rights of the child are concerned, the decree of the Probate Court does not affect them. Whether the property acquired before the passage of the Act defining the rights of husband and wife be held the separate property of the husband, or the common property of the husband and wife, the interest of the child would be the same, under the provisions of the Act concerning wills. (Wood's Dig., 737. See, also, Statute to regulate Descents and Distributions, Wood's Dig., 423, 4, Secs. 1, 10.)

By an order of the Probate Court, the homestead and other property not subject to execution was set apart, in 1855, for the use of the widow, in pursuance of the tenth section of the Homestead Act, and the one hundred and twenty-first section of the Act regulating the settlement of the estates of deceased persons (Wood's Dig., 403, 483.)

The homestead is not common property, but a sort of joint-tenancy, with the right of survivorship. (*Taylor v. Hargous*, 4 Cal. 273; *Revalk v. Kraemer*, ante 66.)

The separate property of the husband may become the homestead. (*Ibid.*)

So far, then, as concerned the homestead, the widow took it by survivorship, and it should not be considered in the distribution of the common property.

The only question remaining to be determined is, whether the property acquired by the testator during the marriage, but before the 17th of April, 1850, when the Act defining the rights of husband and wife took effect, was his separate property, or belonged to the partnership. This will depend upon the state of the law existing at the time.

[510] *The law of Mexico in force here until our statute took effect, was the same, so far as relates to the merits of this question. The property belonged to the community, and upon the death of the husband the widow took one half. The husband had the power of disposition while living, but not by will, which could only take effect after his death. (*Schmidt's Civil Law of Spain and Mexico*, 12, 14, Arts. 43, 44, 51, 52; 1 Cal. 513; 5 Id. 111, 257.)

The decree of the Probate Court is reversed, the cause remanded, and that Court will render a decree in conformity with this opinion.

ADAMS v. THE CITY OF OAKLAND.

¹ NEW TRIAL—MOTION, HOW WAIVED.—A notice of motion for a new trial, unaccompanied by the affidavit required by statute, will not entitle the statement of the grounds of the motion to be considered on appeal.

APPEAL from the District Court of the Third Judicial District, County of Alameda.

Appeal from an order overruling a motion for a new trial.

C. Campbell, for Appellant.

E. R. Carpentier, for Respondent.

TERRY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

In this case, the notice of motion for new trial served, simply informed plaintiff that the "Court would be moved to grant a new trial." Afterwards, a statement of the evidence was filed, but no affidavit or statement of the grounds on which his motion was based.

The statute provides that a party moving for a new trial shall,

within five days after giving notice, make out and file with the clerk the affidavit required, or a statement of the grounds on which he intends to rely. If such affidavit or statement be not filed within five days, the right to move for a new trial shall be deemed waived.

The statute not having been complied with, we can only consider the judgment-roll, which, being regular upon its face, the judgment is affirmed.

*WELCH v. SULLIVAN ET AL.

[511]

¹ **EJECTMENT—IMPROVEMENTS, SET-OFF.**—Where the defendant in ejectment occupied and improved the land *bona fide*, under color of title, the improvements erected by him constitute an equitable set-off to the extent of their value, to the damages recovered by the plaintiff for the withholding of possession.

On rehearing. The report of this case will be found on page one hundred and sixty-five of this volume.

Nathaniel Bennett, for Appellants.

Saunders & Hepburn, for Respondent.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

This case was decided at the July Term of this Court, and a petition made for a rehearing.

Upon a careful examination of the record in this case, we are satisfied that the late Chief Justice who delivered the opinion of the Court, was mistaken in reference to some matters of fact, as well as in the reasons given by him in support of one or two of his positions.

In reference to the right to set-off the value of the improvements against the damages, it appears that the defendants claimed it upon two grounds:

1. Under the Act of 1856 for the protection of settlers; and,
2. Under the Practice Act.

The testimony shows that a part of the improvements were made before the commencement of the suit. The facts of the case show that the defendants occupied and improved the premises, *bona fide*, under color of title. It is a very clear case of equitable set-off.

The instruction given by the Court that if the jury found the Limantour claim fraudulent, they should find for the plaintiff, we think was correct, but not for the reasons assigned in the opinion of the Chief Justice.

The plaintiff had never been in the actual possession of the property, nor had those through whom she claimed. The defendant, Sullivan, had been in actual possession since 1847. This

1. See same case, *ante* 165.

being the case, the plaintiff could only recover upon her strict legal title. Whether the defendants connected themselves with the Limantour title or not, they had a right to show that he, and not the plaintiff, had the title derived originally from the Mexican government. The nature of the plaintiff's title was such that it could not be merely *prima facie*, but must be conclusive, if it existed at all. If the title was in Limantour [512] on *the 7th of July, 1846, then the city had no title whatever at the date of the sheriff's sale, under the Peter Smith judgment, and none passed to the plaintiff's grantor.

But under the state of testimony in this case, it was clear that the true title was either in the plaintiff, or in Limantour. The premises were proved to be within the city limits, and without the limits of the Sherrebeck grant under which the defendants claimed; and the conclusion was, therefore, invincible, that if the Limantour grant was void, the title must be in the plaintiff. If the title had not passed to Limantour, then it passed to the city by the act of Congress; and if the city, it passed from the city, by regular chain of title, to the plaintiff. As to whether the title passed to the city, and from the city to the plaintiff, there was nothing for the jury to decide. These questions were properly decided by the Court, upon the act of Congress, and the deeds put in evidence. The only question then left for the jury was, whether the Limantour grant was a forgery or not. If a forgery, it was void, and the jury were bound to find for the plaintiff.

The objection taken by the counsel of defendants to the admission of the deeds in evidence, through which plaintiff disclaimed her title, we do not think well founded. But we arrive at this conclusion from other reasons than those given by the Chief Justice. The deeds were properly admitted, because they were properly acknowledged, and their execution was conceded. The only objection made by the counsel to the certificates of acknowledgment was in not "stating that the party was personally known to the notary."

For the reasons stated, we think the judgment of the Court below should be so modified as not to allow the plaintiff any damages, as the value of the improvements exceeded the value of the rents and profits. The Court below will modify its judgment accordingly, and the appellants will be entitled to the costs of their appeal.

WHITE v. CLARK ET AL.

¹ EXECUTION, WITHIN WHAT TIME TO ISSUE.—An execution can only be issued upon a judgment obtained before a justice of the peace within five years after the entry of the judgment. In contemplation of the statute, there is no judgment after that time.

IDEM.—STATUTE CONSTRUED.—Section two hundred and fourteen of the Practice Act applies only to judgments of Courts of record.

IDEM.—LOSS OF DOCKET.—The loss of the docket of the justice will not prevent the statute from running.

APPEAL from the District Court of the Seventh Judicial District, County of Marin.

*In February, 1852, McKeever and Nickerson obtained [513] judgment before a justice of the peace, against White and Revere; and on the 3d day of April, 1857, the defendant, Clark, acting as a justice of the peace, and as the successor of the justice before whom the judgment was had, issued an execution upon the judgment, which was levied by the defendant, Vischer, as Sheriff, upon the property of plaintiff, one of the defendants in the execution. The plaintiff then brought this suit against the defendants, as trespassers, praying for damages to the amount of the value of the property levied on. The Court below ordered a judgment for the defendants, and the plaintiff appealed.

W. Skidmore, for Appellant.

T. H. Hanson, for Respondents.

BURNETT, J., delivered the opinion of the Court—**TERRY, C. J.**, and **FIELD, J.**, concurring.

It is insisted by the plaintiff that there was no judgment in force when the execution was issued, and that the writ was, therefore, void.

The six hundredth section of the Practice Act provides that "execution for the enforcement of a judgment in a Justice's Court, may be issued on the application of the party entitled thereto, at any time within five years from the entry of judgment."

By the two hundred and fourteenth section, it is provided that "after the lapse of five years from the entry of judgment, an execution shall be issued only by leave of the Court on motion." But this section refers only to executions issued by the clerk of a Court of record having a seal, and not to executions issued by justices of the peace. In reference to judgments in Justices' Courts, there is no provision allowing an execution to be issued after the lapse of five years. Unless the execution be issued within that period, it is void. In contemplation of the statute, there is no judgment after that time, and a justice has no more right to issue an execution upon such expired judgment than he would have upon a judgment entered satisfied upon the docket.

But in this case, it was found by the Court that the docket of the justice was lost, or mislaid, for some three years, and it is also found that the docket was not discovered and delivered to the defendant, Clark, until the 20th of April, 1857, some time after the issuing of the execution, and the commencement of this suit.

The loss of the docket would not prevent the running of the time limited by the six hundredth section. Were we to determine otherwise, we could not fix any definite limit. The docket might be lost for many years, and then found. If the creditor wishes to keep alive his judgment in such a case, he [514] should take *the necessary steps. By permitting his judgment to expire, he loses his right to issue execution.

But it is insisted by the counsel of defendants, that time does not run against the creditor while the issue of execution is restrained by injunction. This question, however, cannot be raised in this case. It is true that the fact that the judgment-creditors were restrained by injunction, is affirmatively stated in the answer of defendants in this suit, but the finding of the Court contains no reference to such a fact; and there having been no motion for a new trial, we cannot go behind the facts as found by the Court. If such a fact existed, it should have been proven in the Court below.

The execution recited the date of the judgment; and from the facts stated upon the face of the execution, it was issued without authority, and the sheriff was not justified in enforcing it.

The judgment of the Court below is reversed, the cause remanded, and that Court will render a judgment for the plaintiff, as prayed for in his complaint.

WHITNEY v. STARK ET AL.*

PARTIES, WHO TO JOIN.—All the parties in interest should join in an action of trover.

PLEADING, ABATEMENT.—A failure to join, may be pleaded in abatement.

IDEM.—EFFECT OF FAILURE OF PLEA.—Where a part-owner sues, *ex delicto*, and the objection of defect of parties is not set up in the answer, the damages should be apportioned at the trial.

STATUTE OF FRAUD—SALE WHEN VALID.—A sale of personal property, to be valid against creditors, must be accompanied by an actual and continued change of possession.

APPEAL from the District Court of the Seventh Judicial District, County of Napa.

This was an action of trover, to recover of the defendants, Stark, as Sheriff, and Haile, as execution-creditor, the value of two buggies, which the plaintiff alleged had been wrongfully seized and converted, etc.

The defendants justified the taking of the buggies, under an execution, in favor of defendant Haile, and against one Edward H. Cage, alleging that they were the property of Cage, and not of the plaintiff.

On the trial, it appeared that Cage was only the half owner of the buggies, the other part belonging to one Hazelrig, and that

*See *Stewart v. Scannell*, ante 80; *Vance v. Boynton*, post 554.

he had only sold his half interest to plaintiff. At the close of plaintiff's testimony, defendants moved for a nonsuit, on the ground of non-joinder. Motion denied, and defendants excepted.

It further appeared that plaintiff, after his purchase, neglected to remove the buggies, and permitted them to remain in Cage's stable, until they were attached as his property, [515] in the suit of *Haile v. Cage*. Judgment for plaintiff. Defendants moved for a new trial, which being denied, they appealed.

J. H. McKune, for Appellants.

One of two joint-owners of personal property, cannot sustain an action in his own name, to recover such property or its value.

The party plaintiff, if he purchased the buggies at all, did not take or hold possession of them, and they remained on the premises of the vendor, and were there attached by the sheriff. This transaction is void, by the Statute of Frauds, as against *Haile*, one of the creditors, who is in this suit a defendant.

The jury found against the weight of evidence.

The plaintiff complains, that the defendants wrongfully took from his possession, and sold two buggies of the plaintiff, of the value of four hundred dollars. The evidence of the witnesses of the plaintiff establishes the fact that the plaintiff was only one half owner in the buggies; but the jury gave damages in favor of the plaintiff, the full amount of the value of the property.

Now the other part-owner does not complain, and the judgment stands for the full amount of the property.

This is such an excess of damage as cannot stand, and the excess is exactly ascertained—being one half the amount of the judgment.

The defendants moved for a nonsuit, because the other joint-owner was not joined as plaintiff.

This was the earliest time when, with their knowledge of the transaction, they could take advantage of the matter.

The Court overruled the motion, and defendants excepted.

To show that this is error, we cite the following authorities: Civil Practice Act, Secs. 12, 14; *Mandeville v. Biggs*, 2 Pet. 482; 2 Mas. 187; 1 Pet. 299 and 306; *Wisely v. Blatchly*, 1 Barb. Ch. 437; *Wilson v. Hamilton*, 9 Johns. 442; *Bailey v. Ingle*, 2 Paige, 278; *Mitchell v. Lennox*, 2 Paige, 280; *Broughton v. Allen*, 11 Paige, 321.

The words in the statute "may join," as plaintiff, will be construed "must join." (Monell P. 13; Van Santvoord's Pl. 90; 9 Paige, 627.)

The third error complained of, is also a good cause of reversal.

There was very little or no conflict of evidence, consequently all the facts sworn to must be regarded as true. The employment of plaintiff by Cage & Hazelrig, the pretended sale just about the time an execution was levied, the non-delivery to, or at least non-retention of possession, by the plaintiff, are facts,

although not undisputed in this case, yet are really uncontradicted in the testimony; and the jury, in finding for the plaintiff, found against both the law and the evidence. (See [516] *Weldon v. Saffon*, 12 N. H. 171; *Thomas v. Hatch*, 3 Sum. 170; *Whitter v. Latham*, 12 Conn. 392; *Newson v. Lycan*, 3 J. J. Marsh.; *Yule v. Gale*, 13 Conn. 185; *Keggy v. Kile*, 12 Ill. 99; *Franklin Bank v. Small*, 26 Me. 136; *Page v. Carter*, 8 B. Mon. 192; *Kelly v. Jackson*, 6 Pet. 622.)

J. W. Smith, for Respondent.

The evidence of Cage and Fitch shows there was a sale and delivery, and a continual change of possession; and again, where the evidence given on the trial of a cause in the Court below, is conflicting, this Court has repeatedly decided the province of the jury is to believe or disbelieve any portion of the testimony, and they will not interfere. (*Duell v. Bear River and Auburn Mining Co.*, 5 Cal. 84; *Taylor v. McKinley*, 4 Cal. 104; *Amsby v. Dickhouse*, 4 Cal. 102; *Bartlett v. Hogden*, 3 Cal. 55; *Charles Griswold v. Sharp*, 2 Cal. 17; *Hopp v. Robb*, 1 Cal. 373.)

The plaintiff, Whitney, sues for four hundred dollars, the amount that the proof shows he paid for the property. Whether that was a whole or half-interest, I think cannot possibly affect the judgment, as that is the amount of the actual loss sustained by the plaintiff, and, as a matter of course, the exact measure of damage. (2 Greenleaf on Ev., Secs. 253, 261, 266; Co. Lit. 257; 2 Bl. Comm. 438; *Brockwood v. Allen*, 7 Mass. 256; *Bussy v. Donaldson*, 4 Dall. 207; Sedgewick on Damages, 2d Ed., 475; *Finch v. Blount*, 7 Car. & P. 475; *Cook v. Hartle*, 8 Car. & P. 568.)

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

This was an action of trover. The property was levied upon and sold by the defendant Stark, as sheriff, against E. H. Cage. The plaintiff had judgment in the Court below, and the defendants appealed.

The first error assigned by the learned counsel of the defendants, is that the Court erred in refusing the motion of defendants for a nonsuit. It appeared clearly from the evidence of the plaintiff, that he was only a part-owner of the property,—one Hazelrig having an equal interest with him. All the parties in interest as plaintiffs, should be joined. (Pr. Act, Secs. 12, 14; 1 Chitty's Plea. 65.) But there are only two ways of taking advantage of the non-joinder, when the defect does not appear upon the face of the complaint; and that is either by answer or apportionment of the damages at the trial. (Pr. Act, Secs. 40, 45; 1 Chit. Plea. 66; 9 Mass. 74; 1 Wend. 380.) In equity, the objection should be taken by answer or demurrer. (2 Paige, 280.) Where a part-owner brings an action in form, *ex delicto*, and the objection is not made by plea in abatement, the [517] other part-owner may afterwards sue alone. (1 Ch.

Plea. 66.) In this case, the objection was not made by answer. The nonsuit was, therefore, properly refused.

The next point made by the appellants, is that the Court should have granted them a new trial, as the verdict of the jury was against the evidence.

There was some conflict of evidence in reference to some facts; but there was no conflict in reference to the fact that the property was found in the possession of Cage, at the time the levy was made. It appeared that Cage had sold and delivered the property to plaintiff; but, that plaintiff had the property at the stable of Cage, with other property claimed by plaintiff. There was not such a continual change of possession, as to make the title pass as against creditor. (*Vance v. Boynton*, post 554.)

Judgment reversed, new trial granted, and cause remanded.

PEOPLE EX REL. HITCHCOCK v FREELON.

APPEAL FROM JUSTICE'S COURT. — On appeal from a Justice's Court to the County Court, on questions of law alone, if a new trial be ordered, it should take place in the County Court.

APPLICATION for a *mandamus*, to the County Judge of San Francisco County.

A. H. Hitchcock, Relator in person.

E. D. Sawyer, contra.

BURNETT, J., delivered the opinion of the Court—TERREY, C. J., concurring.

The relator obtained judgment before a Justice of the Peace against B. C. Brooks, from which Brooks appealed to the County Court, on questions of law alone. The County Court reversed the judgment of the justice, and ordered a new trial to be had before the justice. The relator insists that the new trial should take place in the County Court, and applies to this Court for a peremptory *mandamus* to compel that Court to proceed to try the case *de novo*.

By the provisions of the three hundred and sixty-sixth section of the Practice Act, there are two distinct classes of appeal from the judgments rendered by justices of the peace, recorders, and mayors:

1. When the appeal is taken on questions of law alone.
2. When taken on questions of fact, or on questions of both law and fact. When the appeal is taken on questions of law alone, the justice sends up a statement, with a copy [518] of his docket, and all motions filed by the parties during the trial, the notice of appeal, and the undertaking on appeal. But when the appeal is on question of fact, or of both law and fact, he sends up no statement. The statement must contain the grounds upon which the party intends to rely on the appeal,

and so much of the evidence as may be necessary to explain the grounds, and no more. (Secs. 625, 626, 627.)

By the three hundred and sixty-seventh section, it is provided that "upon appeal heard upon a statement of the case, the County Court may review all orders affecting the judgment appealed from, and may set aside, or confirm, or modify any or all of the proceedings subsequent to and dependent upon said judgment; and may, if necessary or proper, order a new trial. When the action is tried anew on appeal, the trial shall be conducted, in all respects, as trials in the District Courts."

The object which was intended to be accomplished by the Act in distinguishing between the two classes of appeals, was to save costs in the Appellate Court, in certain cases. As the same laws governing the general transactions of business-life must be applied in Justices' Courts, as well as in others, many cases must arise where the dispute is not about facts, but simply about questions of law alone. If the Act required a trial anew in these cases, it would add greatly to the costs in the County Court. But as it may happen in some cases where the appeal is taken on questions of law alone that a new trial may be necessary or proper, the Court is allowed to order one. As the appellant is required in the statement to give the grounds he intends to rely on, both parties come before the Court without witnesses, and only prepared to discuss the questions of law. If, however, it turn out that a new trial is necessary, the Court orders one to take place, and should set the cause down for trial at some convenient time, so as to allow the parties to produce their testimony. The order should direct the new trial in the County Court. To send the case back before the justice, would defeat, to some extent, the object of the Act, in allowing the appeal on questions of law alone, as the costs would thereby be increased.

If it had been the intention of the Act that the case should be sent back for a new trial to the Justice's Court, there would have been found in the statute, some directions how this should be done, as there is in reference to appeals in the Supreme Court. (Sec. 358.) And it would also be necessary that the decision of the County Court should be given in writing, otherwise the justice would not understand how to proceed upon the new trial. But by section six hundred and fifty-seven, the decision on appeal from a Justice's Court need not be in writing.

It is insisted by the learned counsel for defendant that the County Court holds the same relation to Justices' Courts [519] in such *cases that the Supreme Court does to the District Courts. But this would seem to be incorrect. This Court has no power to try any case anew, while the County Court has. And as the County Court has all the judicial machinery for such trials, there could be no good reason for sending the case back to the justice. The County Court is as competent to try all as a portion of those cases, anew.

Let the writ issue.

PEOPLE v. MURRAY.

¹ INDICTMENT FOR BURGLARY, WHAT TO SPECIFY.—An indictment for burglary, charging an intent to steal certain goods, must specify the value of the goods intended to be stolen; as burglary, under our statute, can only be committed with intent to commit a felony.

APPEAL from the Court of Sessions of the County of El Dorado.

Indictment, trial, and conviction, for burglary. The indictment charges the defendant with feloniously and burglariously breaking and entering, in the night-time, the dwelling-house of one George S. Vaughn, with intent the goods of said Vaughn in the said dwelling-house then and there being, feloniously and burglariously to steal, take and carry away, without specifying the value of the goods intended to be stolen. The indictment then continues in the same count to charge the prisoner with stealing certain specified articles in the house, of the value of forty dollars. The counsel for the prisoner moved in arrest of judgment, upon the ground that the offense of burglary was not charged in the indictment, which motion was overruled by the Court, and the defendant appealed.

Hale & Hume, for Appellant.

The Attorney-General, for the People.

BURNETT, J., after stating the facts, delivered the opinion of the Court—FIELD, J., concurring.

Burglary, at common law, is the breaking and entering the dwelling-house of another, in the night, with intent to commit some felony within the same, whether the felonious intent be executed or not. (Wharton's Crim. Law, 511.)

The fifty-eighth section of our statute concerning crimes and punishments (Wood's Digest, 336), says: "With intent to commit murder, robbery, rape, mayhem, larceny, or other felony." And felony is defined to be "a public offense, punishable with death, or by imprisonment in a state prison." (Wood's Dig. 270.) Grand larceny consists in stealing the personal goods of another, *of the value of fifty dollars, or more, [520] and is punishable by imprisonment in the state prison; and is, therefore, a felony, while petit larceny is not a felony. (Wood's Dig. 337.)

It is clear, from the fact that all the offenses specified in the fifty-eighth section, can be nothing but felonies (except the crime of larceny), and from the further fact that the expression "or other felony" is used immediately after "larceny," that the Legislature intended that the intent to commit a felony must exist in the mind of the prisoner to make the offense complete.

1. Statutes distinguished, *People v. Thompson*, 28 Cal. 218; *People v. Stickman*, 34 Cal. 245.

To charge a party, therefore, with breaking and entering a dwelling-house, with intent to steal the personal goods of another within the house, without specifying the value of the goods intended to be stolen, is not sufficient. The language of the Legislature is too clear, under the well-known rules of construction applicable to criminal statutes, to admit of doubt. It is true that under the construction we are compelled to give the statute, the breaking and entering a dwelling-house with intent to commit petit larceny, may be no statutory offense. But this is an omission which must be provided for by the Legislature.

The indictment in this case is badly drawn. If we were permitted to make a suggestion to district-attorneys, we would recommend them to draw up, at their leisure, a form of indictment, under each section of the statute; so that when they are called upon to draw indictments during the sitting of the Court, they would have a correct precedent already prepared, and which it would be easy to follow. These precedents they would find very useful to them and to their successors in office.

The judgment of the Court below is reversed, and the cause remanded for further proceedings.

PHELAN v. SMITH.

INJUNCTION, WHEN WILL NOT LIE.—A State Court cannot enjoin the proceedings of a Federal Court.

IDEM.—One Court cannot restrain the proceedings of another Court of co-ordinate jurisdiction.

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

This was a bill in equity, filed in the Twelfth District Court, to restrain the proceedings of the Circuit Court of the United States, in the case of *Peter Smith v. Thorn and others*. The defendants demurred to the complaint; the District Court sustained the demurrer, and the plaintiffs appealed.

Charles McC. Delany, for Appellant.

[521] **Gregory Yale*, for Respondents.
No briefs on file.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

The demurrer was properly sustained, for two reasons:

1. A State Court cannot enjoin the proceedings of a Federal Court. (1 Kent, 451.)

2. A Court of co-ordinate jurisdiction cannot restrain the proceedings of another Court of the same jurisdiction. (*Rickett v. Johnson*, ante 34.)

Judgment affirmed.

SHAW v. MCGREGOR.

COURTS, EFFECT OF ADJOURNMENT ON POWERS OF.—After the adjournment of the term, a Court loses all control over its judgments, unless its jurisdiction is saved by some motion or proceeding at the time.

JUDGMENT, WHEN MAY BE SET ASIDE.—The only exception is when service of summons has not been had, in which case a party may, within six months, move to set aside the judgment.

APPEAL from the Superior Court of the City of San Francisco.

In this case the plaintiff obtained judgment by default, in the Court below, October 15, 1856. On the 11th of November following, being at a subsequent term of the Court, the judgment was set aside, on motion of defendant

Plaintiff appealed.

B. S. Brooks, for Appellant.

Crockett & Page, for Respondent.

TERRY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

Appeal from an order setting aside judgment. We have heretofore decided that, "after the adjournment of the term, the Court loses all control over its judgments, unless its jurisdiction is saved by some motion or proceeding at the time, except when the summons has not been served, in which case a party may, within six months, move to set aside the judgment."

In other cases, a Court has no power to vacate a judgment on a motion made after the adjournment of the term at which the judgment was rendered. (*Carpentier v. Hart*, 5 Cal. 406; *Suydam v. Pilcher*, 4 Cal. 280; *Robb v. Robb*, 6 Cal. 21.)

The order of the Court below is reversed, with costs.

*MARZIOU ET AL. v. PIOCHE ET AL.

[522]

MASTER, WHEN MAY SELL OR PLEDGE VESSEL.—In order to authorize the captain of a vessel to pledge or sell the property of his owners for necessities, certain facts must be established: The vessel must be in a foreign port; the voyage must be unfinished; the pledge or sale must be indispensable to enable the ship to complete her voyage.

PRINCIPAL AND AGENT, RATIFICATION.—Ratification by a principal, of the acts of his agent, depends upon the knowledge of those acts on the part of the principal, and where the knowledge is partial, so will be the ratification.

IDEM.—POWERS, WHEN IRREVOCABLE.—Where a principal expressly gives a power to collect debts for the purpose of providing the means to return advances made by the agent, there would seem to be no doubt of the irrevocable character of the power.

IDEM.—POWERS OF AGENT.—The power being irrevocable, the agent has an

1. Cited, *De Castro v. Richardson*, 25 Cal. 52. Approved, *Casement v. Ringgold*, 28 Cal. 336. Cited, *Kidd v. Four Twenty Min. Co.*, 3 Nev. 384.

indisputable right to institute an action to recover the debts due to his principal, even against the objection of his principal.

IDEM.—POWERS, HOW FAR IRREVOCABLE.—But where the debts due exceed the advances due the agent, the principal has a right, if his debtor do not object, to limit the agent's right of recovery to the amount due him for advances; the power being irrevocable only to the extent of the agent's interest.

¹ **IDEM.**—But if the debtor object, the principal has no right to subject him to the costs and expenses of more suits than the parties originally contemplated.

IDEM.—The fact that the first advance was made by express agreement to bear more than legal interest, raises no implication that subsequent advances should do so.

IDEM.—And where particular property was pledged to secure the first advance, the proceeds from a sale thereof must be applied to the payment of that advance.

APPEAL FROM ORDER AFTER JUDGMENT.—After appealing from a judgment alone, a party may appeal from an order overruling a motion for a new trial in the same case, provided the latter appeal is taken in time.

IDEM.—DISTINCT APPEALS.—Taking distinct appeals may affect the question of costs; but, subject to this condition, a party may take them, provided no delay is thereby occasioned.

APPEAL from the District Court of the Fourth-Judicial District.

In the month of December, 1849, the French ship *Java* arrived at the port of San Francisco, under the command of Capt. Devaulx, consigned to the defendants. The vessel was seized by the collector of the port, and detained some six months, when she was released. The defendants sold the cargo before the 9th day of July, 1850, and on that day were indebted to Messrs. Marzaud & Co., of Bordeaux, the owners of the ship and part of her cargo, in the sum of twenty-three thousand three hundred and seven dollars. The defendants not being able to pay the amount, in consequence of losses sustained by the fires of May and June, 1850, obtained an extension from their creditors—twenty per cent. payable in three, thirty per cent. in six months, and fifty per cent. in one year. The deed giving this extension was signed “*Sl’as Devaulx*,” whose name stands at the head of the list of creditors, thus: “Capt. Devaulx, ship *Java*, twenty-three thousand three hundred and seven dollars and twenty-eight cents.”

On the 11th of September, 1850, Capt. Devaulx, instead of returning with his vessel to Bordeaux, determined, without any authority from his owners, to undertake a new voyage to [523] Syd-*ney, for coals. For this purpose he borrowed of the plaintiff the sum of four thousand dollars, at five per cent. per month interest, payable upon the return of the *Java*, or sooner, at the election of Capt. Devaulx. To secure the payment of this loan he assigned, in his own name, to the plaintiffs, the ship, her return cargo, and this debt, besides another ship, the *Chateaubriand*, and certain claims against the United States. The defendants paid the first and second installments, and the

1. Cited, *Grain v. Aldrich*, 88 Cal. 519.

plaintiffs brought this suit to recover the third and last installment in June, 1852.

On the trial, the Court below instructed the jury substantially that the captain of the *Java* had the right to bind his principals by pledging either the ship, her cargo, or this debt, for necessities, and that the assignment was a valid act. The defendants excepted to the giving of this instruction, and then moved the Court to instruct the jury, that though the captain had power to pledge for necessities, there was no evidence to go to the jury that the four thousand dollars were borrowed for necessities; which instruction the Court refused to give, and the defendants excepted.

Subsequent advances were made by the plaintiffs on account of Marzaud & Co., admitted to have been, in amount, eight thousand three hundred and seventy-four dollars to the ship *Chateaubriand*, and eight thousand eight hundred and four dollars, a subsequent advance, to the ship *Java*. Of these advances a portion was credited by the proceeds of the sale of the cargoes. This suit is brought to recover from the defendant their last installment, to repay plaintiffs the balance due on all the advances and interest, and the plaintiffs wrote to Marzaud & Co., requesting a power from them to collect the last dividend due by *Pioche, Bayerque & Co.*, which power was sent by Marzaud & Co. The defendants answered, denying the power of Devaulx to borrow for account of the *Java*, under the circumstances; denying his power to assign the debt of twenty-three thousand three hundred and seven dollars; denying the ratification of his acts by Marzaud & Co., and averring payment in full of the four thousand dollars to Marziou & Co.; and payment of the balance of the twenty-three thousand three hundred and seven dollars, by themselves, in France.

The evidence in this case consists principally of a voluminous correspondence, of which the portions passed upon appear in the opinion of the Court. A payment was made by Capt. Devaulx, December 31, 1850, of two thousand and twenty-five dollars and sixty-six cents, and various other payments made to plaintiffs at different times. There appears to have been no agreement as to the rate of interest upon the subsequent advances made by the plaintiffs, and the parties differ to which of them the payments made shall be applied, the plaintiffs claiming five per cent. per month on all the accounts. The jury rendered a ver-^ddict in favor of plaintiffs, for eighteen thousand [524] one hundred and sixty-nine dollars and ninety cents, being the full amount of the last installment and interest, which appears to be based upon an allowance of five per cent. per month upon the general balance due from the plaintiffs from Marzaud & Co.

A motion for a new trial was made by defendants, and overruled, and judgment rendered in the Court below upon the verdict. Defendants appealed from the judgment, and subsequently

from the order overruling the motion for a new trial, both appeals coming at the same time before this Court.

Saunders & Hepburn and E. Musson, for Appellants.

Of this debt, two thousand and twenty-five dollars was paid by the defendants to the plaintiff, on the 31st of December, 1850, on the order of Devaulx, in their (the plaintiffs') favor, leaving the balance due, principal and interest, on the four thousand dollars, on that day, two thousand six hundred and thirty-five dollars. This sum, with five per cent. a month added, from the 21st of December, 1850, till March 31, 1852, amounts to four thousand six hundred and fifty-four dollars, on which day, at latest, the plaintiffs received seven thousand five hundred and seventy-two dollars, the proceeds of sales of the cargo of coal, and which was pledged for the payment of this debt. From which it appears that on the 31st of March, 1852, the debt of four thousand dollars was extinguished, principal and interest, leaving a balance in the hands of the plaintiffs, of two thousand nine hundred and eighteen dollars.

But the plaintiffs are creditors of Marzaud & Co. for large advances made to the Java, after her return from Sydney, for which they have no collateral. They are also creditors of Marzaud & Co. for advances to the Chateaubriand, which has left this port for Panama and Europe, and for which they have also no collateral. Moreover, they have no contract in writing for interest on these advances, and they are therefore entitled to legal interest, and no more. This is their position on the 31st of March, 1852.

They state one account with "Mr. Devaulx, captain of the ship Java," in which they charge him with the four thousand dollars advanced on the 11th of September, 1850, and interest thereon, at five per cent. a month, giving this item no credit, either for the two thousand and twenty-five dollars, paid by the defendants on the 21st of December, 1850, on account of the debt of twenty-three thousand three hundred and seven dollars, or for the seven thousand five hundred and seventy-two dollars, proceeds of sales of the cargo of coal received on the 31st of March, 1852; although both of the amounts realized were [525] expressly pledged by the shipment of September *11, 1850, as security for the repayment of the four thousand dollars, and interest accruing thereon.

They then state another account with the "ship Java, Captain Devaulx," in which are charged all the disbursements of the ship, for wages and supplies, etc., whilst lying idle in this port—from June 1st, 1851, when she arrived from Sydney, and till March 31st, 1852, when the cargo was sold. They then tack to this bill, five per cent. a month interest, up to March, 1852, on the sum advanced, amounting to eight thousand eight hundred and four dollars, and credit this amount with the seven thousand five hundred and seventy-two dollars, realized from the coal cargo; which is in direct violation of the assignment of Septem-

ber 11, 1850, the proceeds of said cargo being pledged by that instrument to the payment of this four thousand dollars. They then state another account with the "ship Chateaubriand," in which they charge all the advances made to her, with interest added at five per cent. a month, up to March, 1852, amounting to twelve thousand six hundred and twenty-eight dollars, and credit this account with various sums received from Captain Devaulx, and amongst others with two thousand and twenty-five dollars, received from the defendants Pioche & Bayerque, on Devaulx's order—the same being paid on account of the debt of twenty-three thousand three hundred and seven dollars; which is also a violation of the terms of the assignment of September 11, 1850, said debt of twenty-three thousand three hundred and seven dollars having been pledged, by the terms of said assignment, for the repayment of the four thousand dollars, and interest accruing thereon.

The Court will observe that the plaintiffs have never had any transactions with the defendants; that the only act which brings the former in privity with the latter, is the assignment of September 11, 1850, and if this instrument be invalid or unauthorized, the plaintiffs have no title, and no case.

Now, what is this assignment? A loan of four thousand dollars by V. Marziou & Co., to Captain Devaulx, of the ship Java, belonging to Marzaud & Co., merchants of Bordeaux, to secure the payment of which, Devaulx gives in guaranty "the debt due to the Java, by the house of Pioche, Bayerque & Co." This instrument is signed by Devaulx, in his own name. It thus appears that Devaulx has undertaken to transfer property as security for a loan, which, on the very face of the paper containing the transfer, appears to belong, not to him, but to others.

Devaulx, then, has undertaken to assign as his own, and in his own name, what did not belong to him. Accordingly, the defendants objected to the assignment, on the ground that it passed no title; Devaulx having no authority, as master of the ship, to make the transfer, and the plaintiffs having failed to prove any express authority.

*1. It is now submitted that the Court erred in per- [526] mitting the paper of September 11, 1850, to be read in evidence for the purpose of showing a transfer by Devaulx of the interest of Marzaud & Co., in the debt of twenty-three thousand three hundred and seven dollars; said paper for any such purpose, being a mere nullity, it appearing on the face of it that the title to the thing transferred was not in Devaulx, but Marzaud & Co. The statement of this proposition is all the argument it needs.

2. That the Court erred in giving the instruction that Devaulx had a right to assign the debt for necessities, and in refusing the prayer that there was no evidence that the four thousand dollars borrowed were for necessities.

The first was an error, because it was an abstract proposition

of law, utterly unsupported by evidence; and, therefore, calculated to mislead the jury. (*Gittings v. Hall*, 1 Harris & J. 29; *Allegre v. The Maryland Insurance Co.*, 2 Gill. & J. 161; *Evans' Practice*, 229.)

The second was error, because it would have corrected the misinstruction given, and which was absolutely necessary to prevent the jury from being misled.

As a matter of abstract law, a captain has a right to pledge the cargo for necessities, but this right does not spring from his position as captain, but from the necessity of the case; and in order to justify it, the vessel must be, first, in a foreign port; second the voyage must be unfinished; third, the pledge or sale must be indispensable, to enable the ship to complete her voyage; fourth, these facts must be charged in the complaint, and proved on the trial. (*Gratitudine*, 3 Rob. 210, 213, 216, 217, 306; *U. S. Ins. Co. v. Scott*, 1 Johns. 111; *Rucher v. Cunyngnam*, 2 Pet. Ad. 300, 301; *The Packet*, 3 Mas. 260, 261; *Ross v. The Active*, 2 Wash. C. C. 226, 227, 233, 237; *The Fortitude*, 3 Mas. 228, 230, 232, 233, 234, 235, 249.)

3. For the reasons before given, the Court erred in refusing the further instruction, that to recover on the ground of a right to assign for necessities, the fact of the necessity should have been pleaded. (See, for this position, the authorities before cited.)

4. The Court erred in refusing the fifth prayer of the defendants that the plaintiffs had offered no evidence to prove that Marzaud & Co. had knowledge of the assignment by Devaulx, and so having knowledge ratified the same.

In order to recover on the ground of ratification by Marzaud & Co., it was necessary for the plaintiffs to establish two propositions; first, that Marzaud & Co., were fully informed of the act of their agent Devaulx; and, second, that being so informed, they ratified said act; "it being a well settled rule that a principal who ratifies the acts of his agent, must be made acquainted with the character of those acts, and unless all the circumstances *are made known to him, the ratification is void." (*Billings v. Morrow & Co.*, January Term, 1857.)

Now the best way to "make known" to Marzaud & Co., "all the circumstances" of the assignment of September 11, 1850, was to serve them with a copy of the same; but of this there is no pretense. The next best way was to inform them of the contents of the document. What are they? Devaulx borrows four thousand dollars from plaintiffs at five per centum a month, and gives as collateral:

A debt of twenty-three thousand three hundred and seven dollars, belonging to Marzaud & Co.;

The ship Java, belonging to Marzaud & Co.;

The ship Chateaubriand, also belonging to Marzaud & Co.;

The cargo which the Java is to bring from Sydney; all of which is given by Devaulx, in his own name, without the authority of his principals, to enable him to undertake a new voyage, contrary to their instructions.

Under these circumstances it is submitted that it was incumbent on the plaintiffs, in order to recover on the ground of ratification, not only to prove the act of ratification by them, but to establish by proof that it was done with a full knowledge of every fact contained in the assignment, by which alone can they make it the act of Marzaud & Co.

By an examination of the correspondence, which contains nearly all the evidence on the subject, the Court will see not only that Marzaud & Co. did not ratify the act of Devaulx, but the fact is proved affirmatively, by the plaintiffs' own evidence, that they were never informed of his assignment to the plaintiffs.

The Court will see at every sentence that Marzaud & Co. never could have ratified the assignment, because they knew nothing of it, and had not even a suspicion of its existence. They will see also, that while they are informed in driblets of the borrowing of the \$4,000, the going to Sydney, the return with coals, and the use by Devaulx of the two first installments of the \$23,307; they have never the most remote imagination that the bottoms of the Java and Chateaubriand have been hypothecated.

It will be seen, also, that the power of attorney sent to the plaintiffs by Marzaud & Co., to authorize the collection of the money from Pioche and Bayerque, was sent at the request of the plaintiffs themselves, made nearly a year after the title accrued under which they are now claiming the ownership of the debt.

On the case thus made, it is submitted, that there was no evidence to go to the jury to prove a ratification by Marzaud & Co. It is true that it is competent for the jury, and the jury alone, to pass upon all matters of fact, "when evidence legally sufficient for that purpose is submitted to their consideration; yet this legal sufficiency is a question of law of which the Court are the exclusive judges." (*Davis v. Davis*, 7 Har. and J. 38, 39; **Riggin v. Palapasco Ins. Co.*, Id. 294, 295; *Cole v. Hebb*, [528] 7 Gill. and J. 26, *et seq.*)

What then has been done? The Court below, who was to judge of the sufficiency of the plaintiffs' evidence, as a matter of law, to enable the jury to find the fact of ratification, submits the question to them, not only without any evidence to prove it, but in the face of positive and overwhelming testimony to disprove it.

5. The Court erred in refusing to grant a new trial, on the ground that the verdict was against evidence.

Crediting the \$4,000 with the \$2,025 paid by the defendants to the plaintiffs on the 21st of December, 1850, and which was improperly credited to the account of the Chateaubriand the balance due on that day would be \$2,635; and computing interest on that sum at five per centum a month for six years and three months, it would amount to some \$12,500; yet the verdict is for \$18,169.

And crediting the balance of \$2,635 with the proceeds of the cargo on the 31st of March, 1852, and the entire debt and interest is largely overpaid, and the verdict should have been for

the defendants. It will be contended here, no doubt, as it was in the Court below, that only the net proceeds of the cargo should be credited, and that the account of the Java shows that the expenses of the ship more than set-off the whole amount realized from the coal. The answer to this is, that it appears from the accounts themselves that the advances made to the ship by the plaintiffs were all made after the voyage was performed, and her cargo in port, and have, therefore, no connection with it whatever. Moreover, it appears from the letters of the plaintiffs themselves, that the cargo had been brought and the ship dispatched on the voyage, with the four thousand dollars, and that she arrived in this harbor with little or no debt. The cargo was therefore clear, and the avails of it could go only in the way which was agreed, when the money was loaned which purchased it and brought it into market.

Although this action was instituted in June, 1852, the amended complaint on which the plaintiffs went to trial, was not filed till February, 1857; that is to say, the plaintiffs, if they are right in this business, have slumbered for nearly five years on a right to recover eighteen thousand dollars from the defendants!

The short moral of this long story is soon told: Devaulx violated his instructions, and instead of sending the Java to China, where his principals had negotiated a credit to enable him to buy a cargo, he sent her to Sydney. He violated instructions in like manner by purchasing the Chateaubriand, and sending her on a passenger voyage to Panama. Both of these adventures have resulted in heavy losses, and the insolvency of Marzaud & Co., merchants in good credit at the time. The plaintiffs, [529] who ad-vanced on the faith of this credit, seeing they must lose, endeavor, after lying by for several years, to avail of a security which is invalid on its face, and which their own subsequent acts demonstrate that they themselves considered invalid.

The record shows that a motion was made for a new trial; that a statement was made and agreed to, and that on the 21st of March, 1857, the motion was denied, and judgment entered.

From this judgment the defendants appealed.

It is now contended by the respondents that on this appeal the Court can review questions of law alone, and that questions of fact are not examinable, because the appellants have not appealed in terms, both from the judgment and the order denying a new trial.

1. The first answer to this objection is that the appeal is taken both from the order refusing the new trial and the judgment. The denial of the new trial, and the rendition of the judgment, were both contained in a single order, made March 21, 1857, and the appeal is "from the judgment made and entered on the 21st day of March, 1857." Now what was that judgment of March 21, 1857? Not that judgment be entered on the verdict, but that the motion for a new trial be denied, and that judgment be entered on the verdict.

It is certain, therefore, that the appeal is taken from the denial of the motion, as well as the judgment; in other words, from the whole, and not half of the order.

2. But suppose the appeal is from the judgment alone; it is submitted that the facts are still examinable. To prove the contrary, the respondents have cited the case of *Morgan v. Bruce* (1 Code Rep., new series, 364,) which decides that, on an appeal from a judgment, questions of law alone are reviewable. This proposition, as there laid down, is not disputed. In that case, there was no statement, and no motion for a new trial, and the Court, therefore, very properly refused to consider the question that the finding was against evidence.

3. But suppose it does not, and that an appeal from the order denying a new trial, is distinct from, and cannot be covered by the appeal from the judgment. This must be because the appeal from the judgment in nowise affects the order denying the new trial, which being the subject of a distinct appeal, might still be prosecuted independently of, and concurrently with the appeal from the judgment.

By the terms of the stipulation of April 28, 1857, filed during the argument, it will be seen that we have done this.

Gregory Yale and S. Heydenfeldt, for Respondents.

1. The right to re-examine the facts of this case, by this Court, is a jurisdictional question.

*As a question of jurisdiction, there can be no reversal [530] of a judgment in this Court, unless the judgment is appealed from. A new trial is the re-examination of an issue of fact in the same Court, after a trial and decision by a jury. This Court can have no jurisdiction to review the action of the District Court, in refusing to re-examine the issue of a matter of fact, unless the order refusing the new trial is appealed from. This appeal is taken from the judgment alone; upon the idea, that upon such appeal, "any intermediate order involving the merits, and necessarily affecting the judgment," may be reversed, within the meaning of section six of the Act of the 19th of May, 1853, concerning Courts of Justice, and within the meaning of section three hundred and forty-four of the Practice Act, and that such an appeal could be taken within sixty days.

The refusal to grant a new trial is made an express and distinct ground of appeal. An intermediate order can be reviewed upon an appeal from a judgment. One is the subject of a distinct appeal, in connection with an appeal from the judgment; the other, of review, when the judgment alone is appealed from. An intermediate order need not be appealed from. An order refusing a new trial must be appealed from.

The question then is, under the stipulation, whether the party, having already appealed from the judgment, and given notice to that effect, and given his bonds to stay proceedings on the judgment can, at the hearing of the case, when brought on for argument, make another and a distinct appeal, from the order refus-

ing the new trial? If so, he must give a new notice, and file new bonds. He is then in Court on two distinct appeals, in the same case, the second taken before the first is decided, or rather two appeals from two distinct parts of the same case.

No such practice would be tolerated. Where a motion was made by the respondent to dismiss the appeal on the ground that a defective bond was filed, the Court allowed another appeal, upon filing a sufficient bond. (*Martinez v. Gallardo*, 5 Cal. 155.)

The rule is that a party is not permitted to appeal from different parts of the same case, but must bring up all the points decided, on the first appeal, and unless he does, no second appeal is allowed. This rule is correctly stated in *Bridendolph v. Zeller's Exec.*, 5 Md. 64, 65.

2. As affecting the merits that the assignment of a chose in action for money advanced, gives the right to the assignee, to recover in his own name, coupled with an interest not to be divested or affected by transactions between the assignee and debtor, subsequent to the assignment, and notice of the assignment.

The right of an assignee to sue in his own name cannot [531] be *questioned though the debt was assigned as security, and also in consideration of a covenant not to sue upon the debt. (*Warner v. Wilson*, 4 Cal. 813.)

The assignments claimed under all the paper of the 11th of September, 1850, by Devaulx, and the power of attorney from Marzaud & Co., both referred to in the complaint, and introduced in evidence.

The mere delivery of a chose in action, upon a good and valid consideration, is sufficient, without a seal, even if it were a specialty. (*Prescott v. Hall*, 17 Johns. 292.)

The following cases are referred to under this head: *Canfield v. Morgan*, 12 Johns. 346; *Wheeler v. Wheeler*, 9 Cow. 35, 36; *Littlefield v. Story*, 3 Johns. 426; *Andrew v. Becker*, 1 Johns. 531, 532, notes; *Buchanan v. Taylor*, 1 Addison, 155; *Baldwin v. Billingslay*, 2 Vern. 539, case 483; *Legh v. Legh*, 1 Bos. & P. 447; 1 Bacon's Abridgement, 385, title "Assignment."

The answer admits the agency of the plaintiffs under the power of attorney referred to in the complaint, as follows:

"They (the defendants), also admit that the plaintiffs were formerly the agents of Marzaud & Co., duly authorized and empowered to collect all moneys due by these defendants to said Marzaud & Co., but they aver that the power of attorney to that effect, heretofore given by said Marzaud & Co., to Henry Mathey, one of the plaintiffs herein, was duly revoked on the 13th of January, 1853, and that said plaintiffs have from that date continued to remain unauthorized to receive the same."

This power of attorney, being coupled with an interest, amounted itself to an assignment, and was irrevocable. It was given expressly for the purpose of collecting money from the defendants, to be applied to advances made by the plaintiffs to

Marzaud & Co., in aid of Devaulx's individual authority. The attempted revocation about the time that Pioche paid the seven thousand francs in December, 1852, six months after the suit, by a mere letter, not even stating that circumstance, does not invalidate the instrument. Story states the rule in Section 477, on Agency.

This doctrine is recognized by this Court, in *Posten v. Rasette*, 5 Cal. 469.

3. The defendants are estopped by the deed of July the 9th, 1850, from denying Devaulx's authority to assign the debt to the plaintiffs by the paper of September the 11th, 1850.

"The list of San Francisco creditors is given, referring to "Captain Devaulx, \$23,307 23."

Marzaud & Co. are not enumerated among the Bordeaux creditors.

Upon the execution of this deed, and before the plaintiffs had any dealings with Devaulx, the defendants [532] treated with him as their creditor, by making the first payment of twenty per cent. to him. After the assignment to the plaintiffs, the defendants recognized him in the same relation, by paying his draft in favor of the plaintiffs, on account of advances for the Chateaubriand, in the sum of \$2,025 66.

They now say that "his assigns" have no rights under the deed, after they had treated him themselves as the principal, in the payment of the first and second installments, to demand payment of the third.

They are estopped from making this declaration, both by deed and by matter *in pais*. They placed him in a position by their own act before the world, as their creditor, and gave him an opportunity to represent himself as such, and to obtain money from the plaintiffs, upon the faith of declarations in their deed, and a course of dealing with him in relation to that deed and the policy of the law, will not permit them now to deny their own acts, upon the faith of which the plaintiffs had relied.

The general rule is stated in 1 Greenl. Ev., Sec. 207:

"Admissions, which have been acted upon by others, are conclusive against the party making them, in all cases between him and the person whose conduct he had thus influenced."

Numerous illustrations of the bearing of this rule are given in 1 Saunder's P. and Ev., under the head of "Admissions;" *Smith v. Chester*, 1 T. R. 655; *Bass v. Clive*, 4 M. S. 15; *Robinson v. Yarrow*, 7 Term, 455; *Porterhouse v. Parker*, 1 Camp. 82; *Haws v. Watson*, 2 B. & C., 9 E. C. L. 239.

The Court has frequently had occasion to apply the doctrine of estoppel, and in the application made there has been no departure from the plain rule. The following cases from this Court are cited: *Hasler v. Hays*, 3 Cal. 307; *Turtar v. Hall*, 3 Cal. 266; *Redman v. Bellamy*, 4 Cal. 250; *Goodman v. Scannell*, Oct. Term, 1856; *Cal. S. N. Co. v. Wright*, July Term, 1856.

4. The plaintiffs, as assignees, are entitled to recover on the

express promise made to them by the defendants, to pay the assigned debt to them.

"This arises," says COWEN, Justice, in *Hall v. Newcomb*, 3 Hill. 273, "from consideration and privity." The rule is laid down in the elementary books.

The acts of Devaulx, as captain, and as general agent of the Java and her cargo, including his disposition of the cargo and freight to the defendants, his extraordinary dealings with them by permitting them to sell his cargo and collect his freight, and in granting them twelve months' time to pay, by deed under seal, without security; his loan from the plaintiffs, his hypothecation of the debt, his purchase and outfit of the Chateaubriand, her voyage to Panama and Valparaiso, and the voyage of [533] the *Java to Sydney and back; the purchase of her new cargo; his disposition of the cargo, and his disposition of the first two installments of the debt of the defendants under the deed; and, generally, his conduct, while in California, were ratified and adopted, and again acted upon, by Marzaud & Co., of Bordeaux.

The rule of law in respect to ratification, is stated in Dunlap's Paley, 171, "as an authority may be presumed from previous employment in similar acts, so the same presumption arises from subsequent assent or acquiescence; and a small matter will be evidence of such assent."

In note "O" to the text, same page, as a quotation from Livermore, it is said: "It is not necessary that there should be an express act of ratification, in order to oblige the principal to the performance of the contract, or to subject him to the obligation of indemnifying his agent; but his subsequent assent may be inferred from circumstances which the law considers equivalent to an express ratification."

As Marzaud & Co. are indebted to the plaintiffs in a very large sum, beyond the four thousand dollars, and the interest upon that sum, the defendants, as the debtors originally of Marzaud & Co., and at present debtors to the plaintiffs, they do not stand in a position to call the plaintiffs to an account with Marzaud & Co. At least, unless they had some equity to set up against Marzaud & Co., which they could not enforce against the plaintiffs. Whether the debt is extinguished or not is a question to be settled between the plaintiffs and Marzaud & Co.

The verdict of the jury passed, affirmatively, upon the questions of indebtedness of Marzaud & Co. to plaintiffs, and of the ratification of the acts of Devaulx; relating to the loan, and of the express promise of the defendants to pay the plaintiffs, after the notice of the assignment; and, negatively, upon the issue of *nul tiel record*, and of payment by the defendants, as matters of fact, directly in issue, upon which there was contradictory evidence, and is conclusive upon these questions.

As between the same parties, it is denied that, although there was a ratification of the loan, there was not a ratification of the assignment of the debt due from the defendants to secure the

loan. And it is contended that inasmuch as the four thousand dollars' loan had been repaid, the defendants have no right to sue upon the assignment, whether the defendants have paid the Bordeaux house or not.

As between the plaintiff and defendants, it is admitted in the answer, that at the time the suit was instituted, the third installment of the twenty-three thousand three hundred and seven dollars and twenty-one cents, being the one half of that sum, due by the terms of their deed, was owing to the Bordeaux house, and that the plaintiff was authorized to receive it. But it is contended, that since the institution of this suit, the authority of *the plaintiff, under their letter of attorney, was [534] revoked, by a notice to that effect, bearing date on the 13th July, 1853.

The disputed facts are, then : First, as to the ratification of the assignment by the Bordeaux house ; and second, the repayment of the four thousand dollars' loan.

BURNETT, J., after stating the facts, delivered the opinion of the Court—TERRY, C. J., concurring.

It is insisted by the learned counsel for the defendant, that the Court erred in giving the first instruction, as it was a mere abstract proposition of law, and as such, though true, had no application to the case; and was, therefore, calculated to mislead the jury; and more especially so, when the Court refused to give the explanatory instruction.

In order to authorize the captain of a vessel to pledge, or sell the property of his owners for necessities, certain facts must exist:

1. The vessel must be in a foreign port.
2. The voyage must be unfinished.
3. The pledge, or sale, must be indispensable to enable the ship to complete the voyage.
4. These facts must be charged in the complaint and proved at the trial. (*Gratitude*, 3 Rob. 210, 306; *United States Ins. Co. v. Scott*, 1 Johns. R. 111; *Rucher v. Conyngham*, 2 Pet. Ad. R. 300; *The Fortitude*, 3 Sum. 228.)

There was certainly no evidence to show that the money was loaned in order to enable the vessel to complete her voyage ; but the evidence was conclusive that it was loaned to enable her to perform a new voyage without the instructions or consent of the owners, at the time.

But we think this error of the Court could do the defendants no harm, for the reasons hereafter stated. (*Turner v. McIlhane*y, *post* 575.)

But it is insisted by the learned counsel for plaintiffs, that the acts of Captain Devaulx were subsequently ratified by Marzaud & Co., after full knowledge.

Most of the testimony consists in the correspondence between Marziou & Co. and Marzaud & Co., and between Consul Dillon and Marzaud & Co. After a careful examination of all the tes-

timony, it seems clear that Marzaud & Co. were fully informed of the debts created by Captain Devaulx, and ratified his acts in creating these debts. But there is no evidence to show that Marzaud & Co. were ever fully informed of the contents of the assignment made by the captain to the plaintiffs. On the contrary, the evidence, taken as a whole, shows clearly that they were not so informed. Consul Dillon, in his letter to Marzaud

& Co., under date of January 23, 1851, says:

[535] "As to the funds still in the hands of Messrs. Pioche, Bayerque & Co., they will be transmitted to you directly, excepting the first payment, which must be made about this time, the amount of which has been hypothecated previous to the receipt of your letters, on account of the two-fold expedition of the Java and Chateaubriand."

This is a very clear statement that the first payment was hypothecated, and that the other payments were not. No one reading this extract could ever come to any other conclusion. And there is nothing in the letters from the plaintiffs to show that they ever gave Marzaud & Co. any correct notice that the last installment had been assigned to them by Devaulx. But the tenor of the correspondence, on the part of the plaintiffs, would lead any person to a different conclusion.

The act of creating the debt, and the act of making the pledge, are very different things, and a principal, after full information, might have the best reasons for ratifying the first, and for refusing to ratify the second. And when the plaintiffs proved, as they did, that Marzaud & Co. ratified the acts of their agent in creating the debts, they did not show that the acts of this agent in pledging the property of his principals, had been also ratified to its full extent.

But the learned counsel for the plaintiffs insist that Marzaud & Co. themselves pledged this debt to the plaintiffs to secure them for all the advances made, including this four thousand dollars, as well as subsequent loans.

The plaintiffs, under date of May 14 and 31, 1851, requested Marzaud & Co. to send them a power of attorney to collect the last dividends due by P. B. & Co. The power was sent by Marzaud & Co., and in their answer, dated the 13th of August, 1851, they say:

"You will have taken care, gentlemen, for everything necessary to that effect, by finding the surety for your advances on the funds due to us by Messrs. Pioche, Bayerque & Co., which will be easy for you to collect without impediment, by virtue of the power which we send you; praying that when you will be duly secured, you will forward our surplus in good value."

This language, taken in connection with that found in the letters of plaintiffs, and also in the other letters of Marzaud & Co., shows clearly that it was the intention of Marzaud & Co. to give the plaintiffs a power coupled with an interest, and, therefore, irrevocable.

"But, where an authority or power is coupled with an inter-

est, or when it is given for a valuable consideration, or when it is a part of a security, then, unless there is an express stipulation that it shall be revocable, it is, from its own nature and character, in contemplation of law, irrevocable, whether it is *expressed to be so upon the face of the instrument confer- [536] ring the authority or not." (Story on Agency, Sec. 477.)

Where an agent, for the collection of debts, or the sale of property, advances money to his principal before he collects the debt, or sells the property, it must be presumed, from the nature and character of the transactions, that the parties intend the agent shall have a lien for his advances, unless there is "an express stipulation" to the contrary. It makes no difference whether the advances be made before or after the power is given, so they are approved by the principal. And when the principal, as in this case, expressly gives the power, for the very purpose of providing the means to return the advances made by the agent, there would seem to be no doubt as to the irrevocable character of the power. (5 Cal. 469, *Posten v. Rasselte*.)

If these views be correct, the plaintiff had an irrevocable authority to institute this suit; and this being so, the question arises under the proofs in this case, as to what amount were they entitled to recover. Had the plaintiffs the right, against the objection of the defendants and Marzaud & Co., to recover the full amount of the debt due from P. B. & Co., at the time this suit was commenced? or, had they the right to recover only so much as would be necessary to pay the debt due from Marzaud & Co. to them?

It was shown by the defendants that they paid Marzaud & Co. the sum of seven thousand francs, in December, 1852, upon the last installment; and that Marzaud & Co., in January, 1853, formally revoked the power given to plaintiffs, in August, 1851, and positively instructed the defendants to pay to Marzaud & Co. alone.

The creditor has not the right to assign the debt in parcels, and thus by splitting up the cause of action, subject his debtor to the costs and expenses of more suits than the parties originally contemplated. But when the debtor himself does not object, no other party can object for him. The object of the assignment in this case was to secure the plaintiffs, and that end is fully attained, if they are permitted to recover all that may be due to them. Although the power be irrevocable, it is only so to the extent of their interest, and the defendant had a right to pay to Marzaud & Co. all beyond the sum necessary to secure the plaintiffs. And Marzaud & Co. had the right to revoke the power, as to the excess beyond the claim of plaintiffs. And as the defendants have been notified of the revocation, and make no objection to it, but set it up in their answer, it is their duty, as well as their right, to see that the plaintiffs only recover judgment against them for the true amount due from Marzaud & Co.

In this case, the plaintiffs had judgment for the full amount of the last installment, with interest, when it is almost cer-

[537] tain that *their debt against Marzaud & Co. did not amount to so much, after properly appropriating the various payments made at different times. The loan of four thousand dollars drew five per cent. per month by express written agreement, afterwards fully ratified by Marzaud & Co. But there was no express written agreement as to the rate of interest upon the other advances made by plaintiffs, and they can only recover the legal interest of ten per cent. per annum.

With the view we have taken of this case, it will be necessary to remand the case, for the purpose of taking an account, so as to ascertain the amount for which the plaintiffs are entitled to take judgment. In taking the account, the payment made by Capt. Devaulx, December 31, 1850, of two thousand and twenty-five dollars and sixty-six cents, should go to the credit of the loan of four thousand dollars; also, the proceeds of the cargo of coal, after deducting the actual costs of the voyage to and from Sydney, the necessary expense of keeping the coal in the harbor, and commissions on sales. The pledge of the cargo of coal to plaintiffs, to secure the loan of four thousand dollars, was ratified by Marzaud & Co., as appears from their letter to Dillon, December 28, 1850.

There remains but one point undisposed of which it is necessary to notice. The appeal in this case was taken only from the judgment, and not from the judgment and the order overruling the motion for a new trial. It is insisted by the plaintiffs' counsel, that this Court will not review the facts of the case, unless the appeal be from the order refusing the new trial. This is well settled. But in this case, it is stipulated by the counsel of both parties, that as there was, in fact, a motion for a new trial made and overruled, and the appeal only taken from the judgment, this Court may consider the case as here upon appeal, both from the judgment and order, if this Court shall determine that defendants could appeal from the order, after having appealed from the judgment alone.

There can be no doubt as to the right of a party to appeal, either from the judgment or the order, or from both at the same time. The time limited by the statute as to one, is different from that as to the other.

But can a party take distinct and independent appeals? We think he may do so, provided he bring them up for determination at the same time. Taking distinct appeals may affect the question of costs. But, subject to this condition, we can see no error in permitting a party to take distinct appeals in the same case, provided no delay is thereby occasioned. As the point is a new one, we will not turn the appellants out of Court, but will tax them with the costs of this appeal. The stipulation was entered into at the hearing of this case. Had the appellants

[538] taken *their appeal from the order in time for the hearing, the judgment, as to costs, would have been different.

The cause is remanded to the District Court to take the account, and modify its judgment in accordance with this opinion.

PEOPLE v. SHEA

CRIMINAL TRIAL—EXAMINATION OF PROSECUTING WITNESS.—In a prosecution for assault with intent to commit murder, where the prosecuting witness was asked, on cross-examination, if he did not, previous to the assault, buy a pistol to use upon the defendant; to which he answered in the affirmative; it was competent for the prosecuting-attorney to ask the witness to state his reasons for so doing; and his answer that he was induced to do so by "what, he was informed by a third person, the defendant had said," was competent to show the motive of the witness.

APPEAL from the Court of Sessions of Stanislaus County.

The defendant was indicted for an assault with intent to commit murder, and was convicted and sentenced for an assault with an intent to commit bodily injury. The bill of exceptions contains only a small portion of the testimony, and none of the instructions given by the Court. On the trial, the prosecutor, Daniel Perrigru, was examined as a witness, and upon cross-examination, the prisoner's counsel asked the witness, "if he did not buy a pistol, a few days previous to the assault, to use upon the person of Shea, the defendant?" The witness at first answered that he "bought the pistol to defend himself and sister." The question was repeated, and the witness required to answer, "yes," or "no," and he then answered, "yes, I did." The district-attorney then asked the witness to state the reasons therefor, and the witness stated that "from what his sister had told him what Shea said, (the sister being the wife of Shea, the defendant,) induced him to purchase the pistol to use against Shea." The defendant's counsel objected to the testimony, on the ground of its being hearsay, but the Court overruled the objection, and the prisoner excepted. A motion for a new trial was made and overruled, and the defendant appealed.

The jury found defendant guilty of an assault with intent to commit bodily injury, and the Court sentenced him to ten months' imprisonment. Defendant appealed.

Stafford, for Appellant.

The Attorney-General, for Respondent.

BURNETT, J., after stating the facts, delivered the opinion of the Court—FIELD, J., concurring.

The objection on the part of the prisoner does not seem, under the circumstances, to have been well taken. The [539] intention of the prisoner's counsel was to prove the simple fact that the prosecutor had purchased the pistol "to use upon the person" of the prisoner, and from this circumstance, to leave the jury to infer that the witness purchased the instrument with the intent to assault the prisoner, and not use it in his own defense. The attorney for the State had then the right to ask the witness for what purpose he purchased the pistol. The question as to the motive or interest of the witness, was brought out by

the question of prisoner's counsel, and it was competent for the witness to state the grounds of his conduct, to show his motive.

"Thus, when the question is, whether the party acted prudently, wisely, or in good faith, the *information* on which he acted, whether true or false, is original and material evidence." (1 Green. Ev., Sec. 101.)

Judgment affirmed.

NORTON ET AL. v. HYATT.

SAN FRANCISCO—TITLE TO LANDS.—The confirmation of the title of the city of San Francisco, by the Board of United States Land Commissioners, and the dismissal of the appeal by the Attorney-General, have settled that no title to lands, within the limits of that city, can hereafter be acquired from the United States.

IDEM.—FROM WHOM DERIVED.—It follows, that any title accruing to individuals, since July 7, 1846, must have been derived from the local authorities of the city.

IDEM.—RESTRICTION AS TO GRANTS.—The regulation forbidding grants to be made within two hundred varas of the water-line of the bay, had reference only to a portion of the present city front.

APPEAL from the District Court of the Fourth Judicial District.

This was an action of ejectment, to recover the possession of a lot in the city of San Francisco, known as fifty-vara lot fourteen hundred and eighty-four. Plaintiffs claimed under a grant made by T. M. Leavenworth, alcalde, to William S. Clark, dated September 9, 1848. The defendant relied upon possession, and also claimed under a grant made by G. Q. Colton, justice of the peace, to Joseph Nunes, dated December 19, 1849. The case was tried, by consent, without a jury, and the plaintiffs recovered judgment, from which defendant appealed.

E. F. W. Sloan, for Appellant.

E. Norton and *A. C. Whitcomb*, Respondents, in person.

BURNETT, J., delivered the opinion of the Court—**TERRY, C. J.**, concurring.

The confirmation of the city title by the United States [540] Land Commissioners, and the dismissal, by the Attorney-General of the United States, of the appeal from their decision, has settled that no title to lands within the limits of that city can hereafter be acquired from the United States. It also follows that any title accruing to individuals, since the 7th July, 1846, must have been derived from the local authorities of the city.

The only point made by the defendant is, that the premises in dispute lie within two hundred varas of the water-line of the bay, and that, under the laws of Mexico, the alcalde could not make ny grant of lots within that distance.

But, from the proofs in the case, it appears that the lot in question was not situated within the limits intended by the regulations then applicable to the pueblo of San Francisco, although the lot is within two hundred varas of the water-line. These regulations had reference only to a part of the present city front, and did not embrace the lot in question.

It is unnecessary to express any opinion as to whether these regulations had any force after the 7th July, 1846.

Judgment affirmed.

NAGLEE v. MINTURN ET AL.

¹ PARTNERSHIP DISSOLUTION—RIGHTS OF CREDITORS.—Pending proceedings for a dissolution between partners, and until a dissolution is finally declared, and a receiver appointed to make a *pro rata* distribution among creditors, the latter are not prevented from resorting to adverse proceedings; and when a creditor does so, he may gain a preference over other creditors.

IDEM.—PAYMENT BY DEBTOR.—Therefore a debtor of the partnership is justified in payment to the sheriff, on an execution held by such a creditor.

IDEM.—CROSS-DEMANDS OF DEBTOR.—From the same principle it follows, that the debtor has a right to purchase cross-demands against the partnership, and to set them up as a defense to the debt due by him to the partnership.

APPEAL from the District Court of the Fourth Judicial District.

The defendant executed his note to James King of Wm. in 1854, which was afterwards assigned to Adams & Co. On the 23d of February, 1855, Alvin Adams filed his complaint against Woods and Haskell, for a dissolution. The substance of the complaint is stated in the cases of *Adams v. Hackett & Casserly*, January, 1857, and of *Adams v. Woods and Haskell*, July, 1857. At the commencement of the suit Cohen was appointed receiver, in which capacity he acted until April, 1855, when the effects of Adams & Co. were passed to Roman, Cohen, and Jones, assignees in insolvency. The proceedings in *Adams v. Woods and Haskell* were virtually suspended until the beginning of 1856, and until after the proceedings in insolvency were declared *coram non judice* and *void*. In the month of May, 1855, *after [541] Cohen had ceased to act as receiver, Edward Seaman brought his action against Adams & Co., and garnisheed the amount of his debt in the hands of the defendant. Seaman obtained judgment against Adams & Co. in July, 1855, and execution thereon was issued, and defendant paid the amount of the execution to the sheriff. In the month of July, 1855, the defendant also became the owner of certain cross-demands against Adams & Co.; and the amount paid upon the execution, together with the amount of the cross-demands, are set up by the defendant as a complete defense to this action. In October, 1855, the

1. Approved, *Marye v. Jones*, 9 Cal. 337.

plaintiff was appointed by the Court, receiver, in the place of A. A. Cohen, removed, and the note came into possession of plaintiff as such receiver. On the 14th of February, 1856, Gilbert A. Grant was appointed referee, to take an account of the debts due by Adams & Co., for the purpose of making a *pro rata* distribution among the creditors of the firm. And on the 30th of December, 1856, a decree of dissolution was rendered, and the receiver ordered to make a partial distribution of the funds. In the case now under review the Court below gave judgment for the plaintiff, and the defendant appealed.

E. W. F. Sloan, for Appellants.

It is certain that the defense set up by the appellants cannot be prejudiced by any proceedings in the case of *Adams v. Woods and Haskell*, subsequent to July, 1855, and I contend that no steps had been taken in that case which can render the defense invalid.

1. No bill, as to the copartners only, whatever may be its ostensible object, can be made to subserve the purpose of preventing a seizure of partnership property at the suit of partnership creditors.

2. As to the creditors of the firm, the partnership is a unit, possessing in legal contemplation a species of individuality. The copartnership and its property occupy the same relative position, in reference to firm creditors, which the individual debtor and his property do in reference to his own creditors.

3. It cannot possibly be a matter of any importance to the creditors of a firm how the account stands as between the members of that firm; whether the balance is in favor or against one or other of them; or whether their respective shares in the capital stock are equal or unequal, are matters upon which the security of such creditors does not depend.

4. No subject-matter can be litigated in an action, as between the copartners only so as to be binding upon or affect the right of creditors. The creditors can neither take notice of, nor interfere with such action; nor can they be prejudiced by any order, judgment, or decree, made therein. Any injunction in such case restraining the independent action of creditors [542] would be an *anomalous proceeding; and the appointment of a receiver for the like purpose and with the like effect, would be equally so.

5. Each firm-creditor has a perfect right to proceed, by attachment, execution or otherwise, as he may be advised, for the enforcement of his demand against the copartnership property, in like manner as the creditor of an individual debtor may proceed against his property.

Adams & Co., however, did not, and could not, assign by deed to a trustee for the general benefit of creditors. That common law power was taken away by the Insolvent Act. (See Comp. Laws, p. 322, Sec. 29; see also *Cheever v. Hays*, 3 Cal. 471.)

Neither could they make an assignment under that Act, because they were excluded from the operation of its general provisions. They attempted to do so and failed. (See the case of *I. C. Woods et al. v. Barrett*.)

The leading case of *Waring v. Robinson* (1 Hoffman, Ch. 531), fully maintains the doctrine I contend for.

I contend, in the second place, that the cross-demands amounting to the sum of four hundred and ninety-five dollars, as set up in the answer of the appellant Minturn, constituted a perfectly good offset to the demand of the plaintiff, at least to the extent of the sum mentioned.

This, I insist, must be so, for the reasons hereinbefore stated.

These cross-demands are admitted to be genuine subsisting demands, as against Adams & Co.; and that they were acquired by Minturn, in July, 1855.

The attempted proceedings of Adams & Co., under the Insolvent Act, as has been stated, were all *coram non judice* and void. The assignees therein appointed were not vested with a title to the property, choses in action, or effects of that firm. The note here sued on, continued to be the property of Adams & Co., and the demands then acquired by Minturn, were against Adams & Co. These demands, were, therefore, mutual, and no subsequent transfer of the promissory note to the plaintiff, as receiver, can change the character of the offset, or take away the right of Minturn to set it up in defense of the action. (*Johnson v. Bloodgood*, 1 J. Cas. 51; *Dickson v. Evans*, 6 T. R. 59.)

The recent decision of the Supreme Court, in the case of *Adams v. Casserly & Hackett*, is an authority directly in point, and must be regarded as conclusive upon the questions made in this case.

Stow & Brown, for Respondent.

As a general rule, it is true that the creditors of a partnership have no interest in a partnership suit until after a decree of dissolution, and that in the meantime one creditor may proceed against the partners, and get an advantage, if he can. The reason of this is, that until a decree of dissolution, *non constat* that the partnership is insolvent, or that the Court [543] will meddle with its affairs, either for account of the complaining partner or the creditor; and at such a stage of the proceedings, the creditors having no interest in the suit, and not being parties to it, have each of them the obvious right to sue for his own account. That, however, is not this case; for here we have not only the plaintiff, Adams, but the defendants, Haskell and Woods, on the day of the suit brought, consenting to close their business—to put their assets into the hands of the Court, out of their own power, for the purpose of closing the partnership concerns, and paying the partnership debts. From the moment, therefore, that the consent was filed, the dominion of the partners over the partnership assets was voluntarily sur-

rendered, and the rights of the creditors in the assets attached. See the reasoning in *Waring v. Robinson*, 1 Hoffman's Ch. 531, 532, which is fully approved and adopted by Judge BURNETT, in the case of *Adams, per Receiver, v. Hackett & Casserly*, January Term, 1857.

If we are correct, and have been successful in maintaining our proposition, then we say:

That the counter-claims are not a good set-off against the note, and should be excluded, because—

1. Minturn could not avail himself of demands against Adams & Co., purchased after the note had vested in the receiver.

2. It devolved upon the defendant to show that his counter-claim was owned by him, prior to the appointment of a receiver.

After the 23d day of February, 1855, Minturn was no longer indebted to Adams & Co., but to the creditors of Adams & Co.; and the whole design of winding up an estate in chancery would be defeated if the delinquent debtor could avail himself of demands subsequently purchased in a depressed market, and thus liquidate his obligations.

Among the early cases on this point is *Dickson v. Evans* (6 Term R. p. 57), and the principle underlying this case is, that the debtor of a bankrupt shall not be allowed to profit by the bankruptcy to the prejudice of creditors.

We can see no distinction in principle between the case of a bankrupt, and the condition of affairs of Adams & Co. In both cases the estate is cast upon a trustee for the benefit of creditors, for a *pro rata* distribution. One is called an assignee, and the other a receiver; but the office of each is the same, so far as the estate and the creditors thereof are concerned. *Ogden v. Cowly*, 2 John. R. 273, is another case in point.

Again: demands to be set-off must be due to and from the same person, and in the same right. (*Miller v. Rec. of the F. Bank*, 1 Paige, 445; *Hill v. Tullman's Ex.*, 21 Wend. 674; 2 Paige, 406; *Johnson v. Bloodgood*, 1 John. Cas. 51.)

The rights of Adams & Co. in the note were gone; had passed by their own act and the order of the Court to the receiver. [544] *Now, Minturn has no demands against the receiver, nor against the creditors of Adams & Co.; and the character of debtor and creditor has not existed between Minturn and Adams & Co. since February 23, 1855. No party, save the receiver, or the representative of the creditors of Adams & Co. could have maintained an action against the defendant since that time. Minturn owes this debt to the creditors, not to Adams & Co. This must be conclusive of the question of set-off. But—

3. It devolved upon the defendant to show that his demands were owned by him prior to the appointment of a receiver. (6 Term R., 57; 2 John. R. 273, above cited.)

The proceedings of *Seaman v. Adams*, in the Superior Court, under which defendant was garnished, were null and void, and afforded no protection to Minturn.

We shall be met with the position that Minturn was garnished in the suit of *Seaman v. Adams & Co.*, in the Superior Court. In anticipation of this, we say that the attachment having been made after the appointment of a receiver, the debt was not the subject of attachment. (*Adams v. Haskell and Woods*, January Term Sup. Court, 1856.)

BURNETT, J., delivered the opinion of the Court—FIELD, J., concurring.

The only point which seems material in this case, is whether Seaman could gain a preference over other creditors by his superior diligence. In the case of *Adams v. Hackett* (7 Cal. 187), we said, "that until a dissolution has been judicially declared, and a receiver ordered to make a *pro rata* distribution of the partnership assets among the creditors, they are not prevented from resorting to adverse proceedings; and that when a creditor does resort to such proceedings, he may thereby gain a preference over those creditors who are less diligent." The conclusions arrived at in this opinion were adopted by this Court, in the subsequent case of *Adams v. Woods & Haskell*, ante 152.

The present case seems clearly to fall within the principles settled by those cases. Seaman, by his diligence, gained a priority over other creditors, and was entitled to be first paid, and the defendant Minturn was justified in the payment he made to the sheriff. From the same principle it follows that Minturn had the right to purchase the cross-demands. The owners of these cross-demands had the right to have gained a priority over other creditors by suit; and they had the right to sell to Minturn, who was a debtor to Adams & Co., and not to the creditors of that firm. At the time the purchase was made, no decree of dissolution had taken place—the proceedings were virtually suspended, and the creditors acquired no equitable lien upon the fund. As the owners of these cross-demands could gain priority by suit, there was no propriety or justice in compelling them to *resort to legal proceedings, when they could sell [545] their claims to a debtor of the firm.

The Court below should have allowed the defendant credit for the payment made by him upon the execution, and also for the amount of the cross-demands.

Judgment reversed, and cause remanded for further proceedings.

KNOX v. WOODS.

ACCOUNTS AGAINST CITY, AUDITING AND PAYMENT OF.—An account audited against the City of San Francisco, but not paid at the time the Consolidation Act went into effect, need not again be audited to entitle it to payment.

IDEM.—SALARIES OF TEACHERS.—The salaries of teachers, under the Consolidation Act, should be paid in the same manner as other claims against the treasury.

APPEAL from the District Court of the Twelfth Judicial District, City and County of San Francisco.

The plaintiff was employed as a teacher in the common schools of San Francisco, and made out her accounts for salary for the months of May and June, 1856, which were duly audited and allowed, under the provisions of the law as then existing. After the Consolidation Act took effect she presented those audited demands to the defendant, Treasurer of the City and County of San Francisco, for payment; which being refused, she applied to the Twelfth District Court for a writ of mandate. That Court granted a peremptory writ, and the defendant appealed to this Court.

F. P. Tracy, for Appellant.

Wm. W. Crane, for Respondent.

BURNETT, J., after stating the facts, delivered the opinion of the Court—FIELD, J., concurring.

By the provisions of the third, sixth, seventh, thirteenth, and twenty-seventh sections of the Act of 1855, to establish common schools, the school-moneys distributed to the various counties of this State, from the State school-fund, are specially set apart, in the hands of the county treasurers, for the payment of the salaries of qualified teachers. And, by the provisions of the second section of the Consolidation Act, the fund remains a special fund for the same purpose, in the hands of the Treasurer of the City and County of San Francisco.

The first question raised by the record is, whether a claim audited but not paid, before the Consolidation Act took effect, and according to the then existing law, must be again [546] audited *in accordance with the provisions of that Act, before the treasurer can be required to pay the same.

The eighty-second section of the Consolidation Act provides, that "no payment can be made from the treasury, or out of the public funds of said city and county, unless the same be specifically authorized by this Act, nor unless the demand which is paid be duly audited, as in this Act provided, and that must appear upon the face of it." The mode provided for auditing demands against the treasury, by the Act, is very different from that existing under previous Acts.

This language, although general and comprehensive, must be construed with reference to the general interest of the Act. And when we do this, it would seem that it was not the intention of the Legislature to require that to be done over again which had already been well done. The provision was intended to apply to all claims to be audited after the Act took effect, and no claims were required to be again audited, which had been properly audited before. When the claims of the plaintiff were properly audited, they became conclusive against the county, and it could not have been the intention of the Legislature to

again subject them to the discretion of other officers, by whom they might have been rejected. Unless the language of the Act was so clear as to admit of no doubt, we could not be justified in supposing the Legislature intended any such unreasonable consequences.

The question has been raised by the learned counsel for the respective parties, whether the fund received in each year shall be specially paid only to the teachers during that year. There is nothing specific in the Act establishing common schools, in reference to this question.

But, from the general provisions of the Consolidation Act, it would seem that the salaries of teachers should be paid in the same order as other claims against the treasury. By the eighty-eighth section, the treasurer is required to pay every duly audited demand upon the treasury on presentation, if there be sufficient money in the treasury belonging to the proper fund; but if there be not sufficient money, then the demand should be registered in a book, to be kept by the treasurer for that purpose, and then returning to the party presenting it. And by the provisions of section ninety-six, all demands having been presented to, and registered by the treasurer, shall be paid out of any moneys afterwards coming into the treasury, and applicable thereto, in the order in which the same were registered. In the ninety-fifth section, to which a reference is made in the ninety-sixth, there is a detailed specification in fifteen different subdivisions of the objects for which payments may be made out of the treasury; and among the objects thus mentioned are the salaries of teachers in the common schools. From this, it is clear, that the provisions of the eighty-eighth and [547] ninety-sixth sections apply as well to the salaries of teachers as to any other demands upon the treasury.

The defendant having received some \$7,839 of school moneys from the State Treasurer, on the 1st of July, 1856, and 1st of January, 1857, and there being no prior outstanding claims against the fund at the time the claims of plaintiff were presented, it was his duty to have paid the same.

Judgment affirmed.

PEOPLE v. McMAKIN.

¹ ASSAULT, WHAT CONSTITUTES.—The drawing of a pistol on another, accompanied by a threat to use it unless the other immediately leave the spot, is an assault, although the pistol is not pointed at the person threatened.

IDEM.—INTENT TO COMMIT BODILY INJURY.—The drawing the weapon, accompanied by a threat to use, is sufficient to justify the jury in finding an intent to commit a bodily injury.

APPEAL from the Court of Sessions of San Francisco County.

The prisoner was indicted, tried and convicted of an assault

with a deadly weapon, with intent to inflict a bodily injury. A motion was made for a new trial, which was overruled, and the prisoner appealed.

The opinion of the Court contains a full statement of the case.

A. M. Heslep, for Appellant.

W. T. Wallace, Attorney-General, for the People.

BURNETT, J., delivered the opinion of the Court—FIELD, J., concurring.

It is objected by the learned counsel of the prisoner, that the testimony for the people did not establish the commission of any assault. The facts of the case, so far as they are necessary to explain the point, were substantially these: John L. Green, the person alleged to have been assaulted, was riding on horseback, on his way to San Francisco, along a trail that ran through certain lands in dispute between the parties, when he was intercepted by the prisoner, who threatened to shoot the prosecutor if he did not leave the land, at the same time drawing a Colt's revolver, which he held in a perpendicular line with the body of Green, but with the instrument so pointed that the ball would strike the ground before it reached the witness, had the pistol been discharged. The prosecutor turned his horse and rode off, and the prisoner did not pursue him.

[548] *An assault is defined by our statute to be an "unlawful attempt, coupled with a present ability, to commit a violent injury upon the person of another." (Wood's Dig. 335, Sec. 49.)

The intention to commit the act is necessary to constitute the offense in all cases. (1 Salk. 33; 3 Ch. Cr. L. 821, note 1; Russell on Crimes, 750.)

As to what shall constitute evidence of such intention, is the question arising in this case. The ability to commit the offense was clear. Holding up a fist in a menacing manner, drawing a sword or bayonet, presenting a gun at a person who is within its range, have been held to constitute an assault. So any other similar act, accompanied by such circumstances as denote an intention existing at the time, coupled with a present ability of using actual violence against the person of another, will be considered an assault. See the authorities above cited.

In the case of *Hays v. The People*, 1 Hill, 351, it was held that it was not essential to constitute an assault that there should be a direct attempt at violence.

When there is any competent evidence before the jury to show the intent to commit an assault, it is for them to determine the question of intention. The intention must be to commit a present, and not a future injury, upon a different occasion. The acts done must be in preparation for an immediate injury.

But can the offense be committed when the intention is but

conditional? For example: suppose the prisoner intercepted the prosecutor with the intention to intimidate him, if he could, and if he could not, then to shoot him; and suppose he drew his pistol for the purpose of carrying out his intention, so as to be in readiness to use it instantly upon the refusal of the prosecutor to retire, would these facts constitute an assault?

If the prisoner did not intend to use the pistol at all, except for the sole purpose of intimidation, then, it is apprehended, the offense would not have been complete. But when the intent is to go further, if necessary, to accomplish the purpose intended, and preparations are actually made, and weapons drawn, and placed in a position to be instantly used offensively, and with effect, against another, and not in self defense, it would seem to be clear that the offense would be complete. Suppose, in this case, the prosecutor had instantly killed the prisoner, would it have been justifiable homicide? The prisoner put himself in a position to use the weapon in an instant, having only to elevate the pistol and fire, at the same time declaring his intention to do so, unless the prosecutor would leave the ground. It is true the threat was conditional, but the condition was present, and not future, and the compliance demanded was immediate. Where a party puts in a condition which must be at once performed, and which condition he has no right to impose, and his intent is immediately to enforce performance by violence, and *he places him- [549] self in a position to do so, and proceeds as far as it is then necessary for him to go in order to carry out his intention, then it is as much an assault as if he had actually struck, or shot, at the other party, and missed him. It would, indeed, be a great defect in the law, if individuals could be held guiltless under such circumstances.

The drawing of a weapon is generally evidence of an intention to use it. Though the drawing itself is evidence of the intent, yet that evidence may be rebutted when the act is accompanied with a declaration, or circumstances, showing no intention to use it. But when the party draws the weapon, although he does not directly point it at the other, but holds it in such a position as enables him to use it before the other party could defend himself, at the same time declaring his determination to use it against the other, the jury are fully warranted in finding that such was his intention.

Upon the whole record we can see no error in the action of the Court below, and the judgment is, therefore, affirmed.

SWAIN ET AL. v. GRAVES ET AL.

¹ **APPEAL—UNDEXTAKING CONSTRUED.**—An appeal-bond will be so construed as to carry out the obvious intention of the parties.

IDEM.—To support the condition of a bond, the Court will transpose or reject insensible words, and construe it according to the obvious intent of the parties.

IDEM.—But, conceding that there is a necessary discrepancy between the condition and the penal portion of the bond, it cannot be set up by the obligors, as the bond would be single, and, in a suit thereon, the plaintiff would be entitled to the full amount.

APPEAL from the District Court of the Fourth Judicial District.

This was an action commenced in the Superior Court of the city of San Francisco, and transferred to the Court below under the provisions of the Act to abolish the Superior Court. The action is brought by the plaintiffs, R. A. Swain and G. W. McDonald, against James Graves, Milo Hoadly, and Wm. H. Rhodes, upon the following appeal-bond, which is annexed to their complaint:

APPEAL-BOND.

STATE OF CALIFORNIA, }
County of San Francisco. } ss.

Justice's Court, Second Township.—Know all men by these presents, that we, W. H. Rhodes, as principal, and James Graves and Milo Hoadley, as sureties, are held and firmly bound unto R. B. Swain and — McDonald, in the full sum of four hundred and ten dollars, for the payment of which, [550] well and truly to be made, *we bind ourselves, our heirs, administrators, and assigns, firmly, jointly and severally, by these presents.

Signed with our hands, and sealed with our seals, this 19th day of July, A. D. 1856.

The condition of the above undertaking is this, that whereas the said R. B. Swain and McDonald obtained a judgment, before E. W. Smith, Esq., justice of the peace, of said township, county aforesaid, on the 18th day of July, A. D. 1856, for one hundred and ninety-two dollars and forty cents, and costs; and whereas, the above bounden plaintiff is desirous of appealing from the decision of said justice, to the County Court of San Francisco: now, if the above bounden plaintiff shall well and truly pay, or cause to be paid, the amount of said judgment, and all costs, and obey any order the said County Court may make therein, if the said appeal be withdrawn or dismissed, or pay the amount of any judgment, and all costs, that may be recovered against the said appellant, in the said County Court, and obey any order the said County Court may make therein, then this obligation to be null and void, otherwise in full force and virtue.

W. H. RHODES, [Seal]
JAMES GRAVES, [Seal]
MILO HOADLEY. [Seal]

The complaint alleges that the above bond was given in an action commenced by the plaintiffs, against Wm. H. Rhodes, W. Bartlett, C. J. Bartlett, and E. Conner, in which the plaintiffs recovered judgment, and the defendants therein appealed to the County Court, on filing the above bond; that a printed form of bond was used, in which the word "plaintiff" was by mistake inserted instead of "defendant," or "appellant;" that the judgment appealed from was wholly affirmed, in the County Court, with costs; that execution has issued therein, and returned wholly unsatisfied; and that defendants herein, though requested, refuse to pay the same.

The Court below rendered judgment for plaintiffs, and defendants appealed.

Caleb Burbank, for Appellants.

D. P. Rarston, for Respondents.

Cited: *People v. Judges of Oneida*, 1 Wend. 28; *Butler v. Wigge*, 1 Saund. 63; 8 B. Mon. 497; *Stockton v. Turner*, 7 J. J. Marsh. 193; *Waugh v. Russell*, 1 Eng. C. L. 362; *Vernon v. Alsop*, T. Ray. 68.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

*Action upon undertaking on appeal, in which the bond [551] is set out in full in the complaint. Judgment for plaintiffs in the Court below, and defendants appealed.

Plaintiffs allege, in their complaint, that they obtained judgment before a justice of the peace against William H. Rhodes, Washington Bartlett, C. J. Bartlett, and Edward Conner, and that said defendants appealed to the County Court; and that the defendants filed in the Justice's Court an undertaking, executed by Rhodes, as principal, and by Graves and Hoadley, as sureties. The bond was in the penal sum of four hundred and ten dollars; but in the condition of the bond, it is stated that Swain and McDonald recovered judgment, stating the sum, but not the parties defendants, and then states "that, whereas, the above bounden plaintiff is desirous of appealing," etc., and "if the above bounden plaintiff" shall pay, etc.

An appeal bond will be so construed as to carry out the obvious intention of the parties. (1 Wend. 28; 8 B. Mon. 497.)

"To support the condition of a bond, the Court will transpose or reject insensible words, and construe it according to the obvious intent of the parties." (1 Saund. 65.)

"There are many cases on the construction of bonds, where the letter of the condition has been departed from, to carry into effect the intention of the parties." (3 Cranch. 235.)

In the case of *Stockton v. Turner*, (7 J. J. Marsh. 193) it appeared that the name of Peter Cox, the obligor of the bond, was inserted in the condition, instead of that of Turner, the obligee. But the Court held that this was not material, as it was a mistake of such a character as not to affect the obligation of the

bond, and was explained by its whole tenor and effect. So, in this case, the mistake is most palpable. The bond is executed by Rhodes, Graves, and Hoadley, to Swain and McDonald. The only parties bound in the penal portion of the bond were Rhodes, Graves, and Hoadley; and where the phrase "the above bounden plaintiff" is afterwards used in the condition, the intention is clear. There could be no variance between the complaint and the bond introduced in evidence, as the bond was correctly set out in full in the complaint. There was no variance between the allegations of the complaint and the record from the County Court, nor was there any material discrepancy, between the bond and the record, as the full style of the suit was not given in the record.

But conceding that there was a necessary discrepancy between the condition and the penal portion of the bond, the bond would have been single, and the plaintiffs entitled to judgment for the whole amount. (1 Saund. 66; Lord Ray, 68; 7 J. J. Marsh. 13.) Judgment affirmed.

[552]

*ALLEN v. BRESLAUER ET AL.

ARREST AND BAIL—SURRENDER BY SURETIES.—The sureties on the bail-bond of a defendant, arrested in a civil action, are not bound to surrender the defendant within ten days after judgment against him, unless the plaintiff takes such measures as would authorize the officer to hold defendant in custody.

IDEM.—A surrender within ten days after execution is a sufficient compliance with the statute.

APPEAL from the Superior Court of the city of San Francisco.

This is an action on a bail-bond, executed by the defendants, as sureties for one Pinover.

The plaintiff obtained a judgment against Pinover. There was no surrender of defendant, nor any execution issued within ten days after judgment.

After the expiration of ten days, an execution was issued against the body of Pinover, and placed in the hands of the sheriff. On the same day Pinover called on the sheriff, and offered to surrender himself in discharge of his sureties. But the sheriff, acting under plaintiff's instructions, refused to take him in custody. Afterwards, defendants went with Pinover to the sheriff, for the purpose of giving him in custody, when the sheriff again refused to receive him.

The Court below entered judgment for plaintiff. Defendants appealed.

Janes, Lake & Boyd, for Appellants.

The plaintiff should have proved that execution was issued and returned *non est*, the only obligation of the sureties being that the defendant should at all times render himself amenable

to the process of the Court, during the pendency of the action, and to such as may be issued, to enforce the judgment therein.

In the case of *Matoon v. Eder*, the Court discussed very thoroughly the apparent contradictions and hardships of the statute, but as that case was decided upon other grounds, came to no settled determination on this point.

If the views suggested in that case prevail, we suggest that the presence of the defendant, open and notorious, at the place where process should issue, ought to be deemed a surrender under the eighty-second section.

What other surrender could be made? The sheriff would not be authorized to receive him, having no process in his hands.

If, however, we are wrong in the last points, we submit that the proof on the part of the defense made out a complete defense.

The plaintiff, after the expiration of ten days, did issue an execution against the body of the defendant, whereupon the defendant surrendered himself to the sheriff, but the sheriff refused to receive him.

*If the plaintiff elected to look to the bail-bond after [553] the ten days had expired, he should not have issued an execution.

The issuing of an execution was an election to still pursue the defendant, and the surrender of the defendant to the sheriff was a compliance with the conditions of the bail-bond, the plaintiff having, by suing out the execution, waived the technical forfeiture.

To permit the plaintiff to sue out the execution, which, in terms, commanded the sheriff to take the body of the defendant, and then, by verbal direction, to command him not to obey the writ, would be sanctioning a proceeding which the Court would not willingly endorse.

Now, suppose the sheriff had taken the defendant in execution, would not the undertaking have been satisfied, and the sureties discharged?

If so, then why should not the surrender of the defendant have the same effect?

Edward MacKinley, for Respondent.

No surrender having been made of the defendant, Pinover, either by himself or by his bail, in their exoneration, they, the defendants in this action, became finally charged, under sections eighty-two and eighty-three of the Practice Act, to pay the amount of the judgment.

This action was brought, and the judgment herein recovered, under the law contained in the two foregoing sections, and the construction given thereto by this Court, in the case of *Matoon et al. v. Eder et al.*

It is true that an execution was issued, but better judgment gave direction, that no action should be taken thereunder. It was unadvisedly issued, but judiciously arrested, before any ac-

tion had been taken under it. (See *Cains v. Smith*, 8 Johnson, 337.)

There was no obligation on the part of the plaintiff to arrest a *quasi* criminal on final process in that action, particularly as the practical effect of doing so would have been to release the bail and to furnish the defendant Pinover with an asylum in a debtor's prison at the plaintiff's expense, until he would have been discharged under the provisions of the statute of A. D. 1850.

Had the sheriff, without the consent of the plaintiff, accepted the offers of the defendant and the sureties to surrender Pinover, after the bail had been finally charged, he would have thereby rendered himself liable to the plaintiff for the amount of the judgment and costs.

This is not a hard case on the appellants. The act to bail Pinover at a time when they considered him innocent, was voluntary on their part; and they should have been admonished, by his conviction of fraud, of his unworthiness of the [554] succor *which they had extended to him, and should then have surrendered him in their exoneration.

TERRY, C. J., after stating the facts, delivered the opinion of the Court—BURNETT, J., concurring.

The question presented is, whether, under this state of facts, defendants are liable. We think not. The Legislature, when providing for the surrender of defendant within ten days after judgment, evidently contemplated that the plaintiff should take such measures as would authorize the officer to hold defendant in custody. "The law requires no man to do a vain thing," is a familiar maxim, and certainly it would be in vain to require a party to surrender to an officer having no power to detain him.

The construction contended for by plaintiff, would enable a defendant to release his sureties by a surrender before execution, and then at once be released on *habeas corpus*, on the ground that he was illegally in custody. Such a result was never intended by the Legislature, and we are of opinion that a surrender within ten days after execution, is a sufficient compliance with the will of the Legislature.

Judgment reversed.

VANCE v. BOYNTON.

SALE AND DELIVERY—TITLE OF FIRST PURCHASER.—Where the purchasers from a common vendor are equally innocent, or equally in fault, the first purchaser is entitled to the goods.

IDEM.—SALE WHEN VOID.—Whether a sale of personal property is void as to subsequent purchasers, must be determined under the fifteenth section of the Statute of Frauds.

DELIVERY, WHEN A QUESTION OF LAW.—The question of delivery and change of possession, under the fifteenth section, is a mixed question of law and fact; but as to what shall constitute a delivery, is a question of law alone.

TRIAL—QUESTION OF INTENT.—The question of the intention of the parties should not be submitted to the jury.

¹ SALE OF PROPERTY IN BULK—INSUFFICIENT DELIVERY.—Where H., the owner of barley, which he has piled up in his corral, sells five hundred sacks thereof to V., who has it separated, marked "V.," and piled up in another part of the corral, and employs a third person to take care of the same for him, and H. afterwards sells and delivers the same to B.: *Held*, that B. was entitled to the property, the sale from H. to V. not being followed by an actual and continued change of possession.

APPEAL from the District Court of the Seventh Judicial District, County of Solano.

This was an action to recover the value of five hundred sacks of barley, alleged to belong to the plaintiff, and converted to his own use by the defendant. The facts were substantially these: One Haggett grew this, with other barley, upon his farm, and sold the same to plaintiff on the 25th of August, 1856. The sacks were marked "V.," were counted, separated from other sacks of barley, and placed in a position by themselves in Haggett's corral, which was used by H. as a storehouse for his *grain. The plaintiff at the same time employed one [555] Chase to take care of the grain for five dollars per month. Chase was about the corral and looked after the barley for some two to four weeks, when he left and went to work at another place some eight or ten miles distant. On the 15th or 16th of October, 1856, Haggett delivered at Wing's storehouse five hundred and ninety-five sacks of barley, including the five hundred sacks sold plaintiff. Haggett took a warehouse-receipt for the entire lot of five hundred and ninety-five sacks, and some time afterwards sold the barley to defendant, who then took a warehouse-receipt in his own name. The barley remained in the warehouse until the middle of February, 1857, when it was removed by defendant. Chase, the agent of plaintiff, saw Haggett when hauling away the last load of the barley, and about one week afterwards, also saw the sacks marked "V." at the warehouse. A verdict and judgment were had for the plaintiff, and defendant appealed.

On the trial the defendant's counsel asked the Court to charge the jury: "If there was a sale from Haggett to Vance, then the sale was fraudulent and void as to defendant as a purchaser, unless the delivery was immediate upon the sale, and followed by an actual and continued change of possession."

This the Court refused, and defendant excepted. The Court then, of its own motion, instructed the jury as follows, under the exception of defendant:

"That the first thing the jury were to ascertain and determine was the fact whether or not Haggett sold and delivered the barley to Vance. That if, for a valuable consideration, the grain was sold to Vance, the sacks separated, counted, and piled up by themselves, there was a sufficient delivery as between Haggett and Vance to pass the title to Vance. That upon the ques-

1. Cited *Whitney v. Stark*, ante 517. Approved *Bacon v. Scannell*, 9 Cal. 273.

tion of delivery as between Vance and the creditors or subsequent purchasers of Haggett, and also as to there being a continued change of possession, these were matters of fact for them to pass upon, since they were to determine the fraudulent intent. If they found there was not an actual delivery and continued change, the sale was made by the law itself fraudulent and void as to subsequent purchasers in good faith; that the question was rather what was the motive of Vance than what was the motive of his vendor. If Vance bought in good faith, and had no knowledge of the purpose of the vendor, the sale was good, though Haggett might have intended to defraud subsequent purchasers."

The Court further instructed the jury, under the exception of defendant's counsel:

"That the question whether or not the barley was delivered by Haggett to Vance, was a question for the jury to decide.

But if there was such a delivery by Haggett to Vance, [556] and *such a taking of the possession by Vance as a man would ordinarily take of such property sold to him, then the title to the grain passed to Vance; and if purchased by Vance in good faith, then he could not be deprived of his right to it by a subsequent taking of it by Haggett, unless he consented or connived at such taking. That the question was not whether Haggett acted in bad faith, but whether the sale from Haggett to Vance was to be considered fraudulent and void as to Boynton as a subsequent purchaser, because of any fraudulent intent on the part of Vance—that if Vance became the owner of the grain by purchase from Haggett, and continued in possession until it was taken away by Haggett against his consent, he could not be deprived of his right to the grain by the subsequent sale and delivery of it by Haggett to Boynton."

John Curry, for Appellant.

This action was brought by the plaintiff and respondent against the defendant and appellant, for the alleged taking and carrying away of five hundred sacks of barley of plaintiff, which plaintiff alleges was worth one thousand two hundred dollars.

The answer of the defendant puts at issue every material allegation of plaintiff's complaint, and also sets up title in himself of the barley mentioned in the complaint.

The action was tried in Solano county, at the March term of the District Court, in the year 1857, and a verdict and judgment rendered in favor of plaintiff against defendant for eight hundred and seventy-five dollars damages.

A new trial was applied for in due time by the defendant, and the motion therefor was denied at the term of the District Court held in said county in June, 1857.

From the judgment entered, and from the order refusing the new trial applied for by defendant, the defendant appealed to the Supreme Court.

The Act concerning fraudulent conveyances and contracts, (Comp. Laws, 201, Sec. 15,) declares, that every sale made by

the vendor of goods and chattels in his possession, or under his control, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold, shall be conclusive evidence of fraud, as against subsequent purchasers in good faith.

The Court below was requested, in writing, by appellant's counsel, to instruct the jury substantially in the language of the fifteenth section of the Act above cited. This request was refused, and the defendant's counsel duly excepted.

The question presented to the jury, by the evidence in the case, involved, directly and especially, the point as to the effect of the want of a continued and exclusive change of the possession of the barley sold by Haggett to the plaintiff, when the rights of *the defendant, Boynton, as the subsequent [557] purchaser of the same barley from Haggett, were to be considered and protected, if by law entitled to protection.

The Court below seemed to take special pains to keep from the consideration of the jury the question of the legal fraud, to a subsequent purchaser in good faith, arising from a want of an actual and continued change of possession of the property sold.

This is apparent, not only from the denial of the instruction requested, but from the instructions given upon an abstract point, not really of the case, and which effectually led the jury from the real issue to be passed upon by them. (1 Smith's Lead. Cases, and the Kentucky decisions therein cited, pages 52, 53, and 54.)

The persons who can take the objection that a sale was made with a fraudulent intent, are enumerated in section twenty of the Act above referred to. A subsequent purchaser is not of the number of such persons.

A conveyance or sale of goods or chattels, made with the intent to hinder, delay, or defraud creditors or other persons, of their lawful suits, damages, forfeitures, debts, or demands, as against the persons hindered, delayed, or defrauded, is, by said section twenty, declared void.

The question of fraudulent intent could not arise in a contest between the prior and subsequent vendee of the same vendor, in respect to the first sale; and hence, to charge the jury in substance that in determining the question of an actual delivery and a continued change of possession of the property sold, the intent or motive of either Haggett or Vance was to be considered and determined, was not only calculated to mislead the jury, but, in the case at bar, involving the rights of the appellant as the subsequent purchaser of the same barley, was palpably erroneous as matter of law.

The motives of Haggett or Vance, at the time of their contract of sale and purchase, could not properly enter into the controversy between the plaintiff and defendant, because the defendant was not of the class of persons who could object that such sale was made with intent to hinder, delay, or defraud; and the

direction by the Court to the jury, to consider and determine the motive of Vance in that transaction, with the specific instruction, that, "if Vance bought in good faith, and had no knowledge of the purpose of the vendor, the sale was good, though Haggett might have intended to defraud subsequent purchasers," was in effect an instruction to the jury to determine the case, as they might first ascertain whether the motive of Vance, at the time he purchased the barley of Haggett, was honest or dishonest. (1 Smith's Lead. Cases and N. Y. decisions therein, cited 60-63; *Jennings v. Carter*, 2 Wend. 446; [558] *Diover v. McLaughlin*, Id. 596; 1 Am. Lead. Cases, 75, 76; *Hastings v. Belknap*, 1 Den. 198.)

The jury might have found a verdict in favor of the defendant, if they had not been enjoined by the Court that the question for them to decide was, whether the sale from Haggett to Vance was to be considered fraudulent and void as to Boynton, as a subsequent purchaser, because of any fraudulent intent on the part of Vance; and that the verdict would have been for the defendant, if the question of a want of an actual and continued change of possession of the barley, from the time of the sale to Vance until the sale, two months after, to Boynton, by the same vendor, had been fairly submitted to the jury, there cannot be, in view of the evidence, any doubt.

As between vendor and vendee, a sale may be effectual to pass the property sold, without actual delivery. "When the terms of sale are agreed on, and the bargain is struck, and everything that the seller has to do with the goods is complete, the contract of sale becomes absolute as between the parties, without actual payment or delivery, and the risk of accident to the goods vests in the buyer. (2 Kent's Com. 492; *Turling v. Baxter*, 6 Barn. & C. 360.)

But when the interests of creditors or subsequent purchasers are concerned, and are to be considered the rule of law is inflexible that there must be an actual delivery of the property sold, and such delivery must be followed by an actual and continued change of possession.

The existence of a fraudulent intent on the part of Vance was not necessary to be found, in order to divest him of a right to the barley, and to invest the appellant with right and title thereto by virtue of the purchase made by him of Haggett. Even if Vance purchased the barley in good faith, and if Haggett sold to Boynton without the consent of Vance, still, if the barley was left in Haggett's corral, and apparently under the control of Haggett, it would not be just, nor in accordance with the law that the appellant, a subsequent purchaser, should suffer by the fraud which the plaintiff's misplaced confidence gave Haggett the opportunity to practice.

The evidence deduced from the witnesses, for the plaintiff as well as the defendant, shows that the barley was permitted to remain stored in Haggett's corral, where it was at the time of the plaintiff's purchase, and where Haggett had his own grain

stored for nearly two months after the sale to Vance. Such being the evidence, the question was at once directly presented, whether there was such a delivery, and such an actual and continued change of possession of the barley as would satisfy the demands of the law, and cast the consequences of Haggett's actual fraud on the appellant, as a subsequent purchaser. But the point as to an immediate delivery, and an actual and continued change of possession of the barley, was kept [559] almost entirely out of view, under the directions and instructions of the Court. By the course of ruling and charge to the jury adopted, the appellant believes he has unjustly suffered the loss of his case in the Court below.

In Chitty on Contracts, 414, it is said: "It seems that the change of possession necessary to rebut the inference of an intention to defraud creditors must be substantial, *bona fide*, and exclusive; and consequently that the sale or assignment will be considered fraudulent and void, and the assignor's possession colorable if the goods be left upon the premises of the assignor, and in his apparent disposal and order, although the vendee or his servant enter upon the premises, and be also in possession of the goods." (*Paget v. Perchard*, 1 Esp. 205; *Wordall v. Smith*, 1 Camp. 333; *Hamilton v. Russell*, 1 Cranch, 310; *Collins v. Brush*, 9 Wend. 198; *Doane v. Eddy*, 16 Wend. 523.)

The evidence produced on the trial was ample in respect to the barley remaining in Haggett's corral with his grain until about the middle of October, when it was removed and sold to Boynton.

The authorities cited above apply to the point here made.

The grounds herein presented as assignments of error were made before the Court below, on the motion for a new trial; and the refusal to grant a new trial for the reasons stated, and because the verdict was contrary to the evidence produced on the trial, the appellant here assigns as another and repeated error of the Court below.

Whitman & Wells, for Respondent.

The point of the case is—did the Judge below err in his charge to the jury? It is not proposed to review the points made by appellant, *seriatim*, as they are all more or less involved, the one in the other; and one general review of the testimony and charge of the Court, will present the point of the case as above stated. Vance and Boynton both claimed to be innocent purchasers. Of the fraud of Haggett toward one or the other, and perhaps both, there can be no doubt.

The evidence of John W. Chase, with regard to Vance's purchase, shows conclusively that there was an immediate delivery and an actual and continued change of possession, until the possession of Vance was intruded upon by Haggett, without the connivance of Vance. The sale and subsequent possession are neither of them clouded by any badge of fraud, but present the ordinary features of a common commercial transaction. So, it

must be admitted, does the purchase subsequently of Boynton, save the one fact, which the record discloses—that a lower price was paid by Boynton than the article was actually worth in the market, which, as grain is a cash article, and always has [560] a value *as fixed as gold and silver themselves, is decidedly significant, as regards the good faith of Boynton in the transaction.

Admitting, for the purposes of this argument, that Vance and Boynton were both equally innocent purchasers, and one must unfortunately suffer, which of the two shall it be?—the prior or subsequent purchaser? The law has settled that question. *Prior est in tempore, potior est in jure.*

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

This is a case between two purchasers of the same property, from the same fraudulent vendor; and the only question regards the person who must sustain the loss. If both purchasers were equally in fault, or equally innocent, then the first purchaser was entitled to the property. It is a case arising under our Statute of Frauds. (Com. L. 199.)

The first section of the Act relate solely to fraudulent conveyances of, or charges upon, lands, or the rents and profits thereof, made or created with intent to defraud purchasers, prior or subsequent. The twentieth section relates to conveyances, and assignments of any estate in lands, or goods, with intent to defraud creditors or others, of their lawful suits, damages, forfeitures, debts, or demands. The first section only relates to purchasers, and the twentieth to creditors and others, sustaining substantially the same relation to the vendor, and not to purchasers.

From the provisions of these sections, a sale of land made with intent to defraud purchasers or creditors, would be void. But there is nothing in these provisions that would make a sale of personal property, with intent to defraud subsequent purchasers, void as to them.

We must then look to the fifteenth section as the only provision in the Act applicable to this case. By that section, unless the sale “be accompanied by an immediate delivery, and be followed by an actual and continued change of possession,” it will be void as against subsequent purchasers in good faith.

If, then, a sale of chattels be made with the intent, both on the part of the vendor and vendee, to defraud subsequent *bona fide* purchasers, the same would not be void under the statute, as against such purchaser, unless the sale was not accompanied with the delivery and continued change of possession required by the fifteenth section. Where the sale is accompanied with such delivery and change of possession, it is difficult to see how a subsequent purchaser could be injured without carelessness or fault on his part. When the delivery and change of possession exist, the subsequent purchaser has notice, and if he purchase

of the original vendor, then out of possession, there is nothing in the statute to give him relief.

*It would then seem clear that the question of intention can have nothing to do with sales made void by the fifteenth section. That section makes certain facts conclusive evidence of fraud. These facts are not made up of intention, in whole or in part. The intention of the vendor and vendee, or either of them, constitutes no part of this "conclusive evidence of fraud." The simple fact, and that fact alone, that the vendor remains in possession of the thing sold, makes the sale void. [561]

In this case there was no question of intention for the jury to determine. A question of intention, in the nature of the case, must be a question of fact, and if so, must be determined, in all cases, by the jury. But this question of intention arises under sections 1 and 20, but not under Section 15.

The question of delivery and change of possession, under the fifteenth section, is a mixed question of law and fact. What are the circumstances existing in the particular case, is a question of fact for the jury. But, conceding their existence, whether they constitute the immediate delivery, and the actual and continued change of possession required by the statute, is solely a question of law for the Court. When the facts are conceded, or clearly proved, there is nothing for the jury to determine.

In this case there is no conflict of testimony, and the main substantial facts are clearly established.

We have already held, that a vendor having possession of the property as clerk, or as warehouseman of the vendee, rendered the sale fraudulent. (4 Cal. 289; *Stewart v. Scannell*, ante 80.)

The mere change of the capacity in which the vendor acts while in possession of the goods, will not save the sale from the provisions of the statute.

The object of the fifteenth section of the act was to adopt a plain, simple and conclusive test. If the parties be held strictly to change the possession of the property sold, it is the greatest possible check upon fraud. The fraudulent vendor cannot enjoy the benefit of his fraud, if the statute be rigidly enforced. There can exist no motive for fraud, when nothing can be gained by it.

The possession of property is necessary to its beneficial use; and when the fraudulent vendor must deprive himself of its possession and use, to comply with the statute, there can be no adequate motive for the sale.

In this case the apparent ownership of the property was left in Haggett by the act of the plaintiff. The barley was left where it would have been had it not been sold. The mere change from one part of the corral to another, did not destroy this apparent ownership, so long as the corral itself remained in the possession of Haggett. No one, not acquainted with the trade, would have been able to know the real owner. The

[562] agent *of plaintiff looked after the property at intervals, but never changed its position, and suffered Haggett to remove and store it as his own.

This case differs very much from some former cases, where the property was found, and left in the possession of a warehouseman. The delivery of possession was sufficient, and the change of possession would have been good, if the property had been on storage at the time of sale. In such case the warehouseman becomes the agent of the purchaser, and the property is, in no sense, in the possession of the vendor.

We think, in this case, the change of possession was not actual and continued. The rule is well laid down in Chitty on Contracts, seventh Am. Ed. 414.

“It seems that the change of possession necessary to rebut the inference of an intention to defraud creditors, must be substantial, *bona fide* and exclusive; and consequently, that the sale or assignment will be considered fraudulent and void, and the assignor's possession colorable, if the goods be left upon the premises of the assignor, and in his apparent disposal or order, although the vendee or his servant enter upon the premises, and also be in possession of the goods.”

The instructions of the Court below, in submitting the question of intention to the jury, were erroneous.

Judgment reversed, new trial granted, and cause remanded.

GRAY v. HAWES ET AL.

EXECUTION SALE UNDER VOID JUDGMENT.—A sale under a void judgment passes no title. If the judgment is merely voidable, the sale is good.

1. APPEARANCE, ERRORS NOT CURED BY.—A judgment, void for want of personal jurisdiction, is not cured by the appearance of the party for the purpose of vacating it.

JUDGMENT, JURISDICTION TO SUSTAIN.—To sustain a personal judgment, the Court must have jurisdiction of the subject-matter, and of the person.

JURISDICTION NOT CONFERRED BY CONSENT.—Where the jurisdiction of the Court, as to the subject-matter, has been limited by the Constitution or by statute, the consent of parties cannot confer jurisdiction.

IDEM.—But when the limit regards certain persons, they may, if competent, waive their privilege and this will give the Court jurisdiction.

JUDGMENT, EFFECT OF WANT OF JURISDICTION.—The presumption in favor of the judgment of a Court of general jurisdiction, is overthrown when the record of the entire case discloses a want of jurisdiction.

APPEAL from the Superior Court of the City of San Francisco.

This was an action to recover certain premises in the city of San Francisco, in which both parties claimed under David A. Cheever. On the 11th of October, 1850, Isaac Norman obtained judgment in the District Court of the Eighth Judicial

District, against Cheever and others, and a transcript of [563] the judgment was duly filed in the re-corder's office of San Francisco county, on the 18th day of December,

1850. Upon this judgment, an execution was issued March 4, 1851, and levied by the Sheriff of San Francisco, upon the premises, but the sale was stayed by order of the Eighth District Court. An alias execution was issued 24th of June, 1851, and the premises sold by the sheriff, and purchased by Norman, from whom, by several *mesne* conveyances, the plaintiff derives his title. Cheever, on the 23d of October, 1852, conveyed the property to Sullivan, from whom the defendant Gavard derives his title.

On the trial in the Court below, the plaintiff introduced a certified copy of the judgment, and also of the execution, the sheriff's return thereon, and the sheriff's deed, duly executed, acknowledged, and recorded. On the part of the defendant, a duly certified copy of the whole record of the proceedings in the Eighth District Court was put in evidence. From this record it appeared that Norman, Ralfe, Pierson, Ruth, and Cheever, entered into a written agreement in February, 1850, by which Norman bound himself for the construction of a ten-pin alley, for which the other parties were to pay him a specified sum. In September, 1850, Norman, Ralfe, Pierson, and Ruth, by written agreement, stipulated to submit the matters in dispute between them in regard to the ten-pin alley, to arbitrators, and that when the award should be made, the District Court should render judgment thereon. The award was made, and the District Court rendered the judgment against all the parties, including Cheever. No suit was commenced, and no appearance by the parties defendants, in Court, the judgment having been rendered upon the award of the arbitrators, the submission, and the argument. Afterwards, Cheever, Ralfe, Pierson, and Ruth, moved to set aside the judgment upon various grounds, one of which was, that the Court had not jurisdiction of the persons of the defendants. The motion was overruled. The defendants afterwards appealed to the Supreme Court, in December, 1851, and upon the hearing, the judgment was reversed, on the ground that the award was uncertain and incomplete. (2 Cal. Rep. 599.)

Defendant had judgment in the Court below. Plaintiff moved for a new trial, which being denied, he appealed.

G. H. Gray, Appellant, in person.

The Court below found the judgment of *Norman v. Cheever*, as against Cheever, to be null and void. This is erroneous, because the record does not show any want of jurisdiction in the District Court.

*The judgment itself shows nothing which is out of the [564] jurisdiction of the Court; it is in these words: "Judgment was rendered upon the award of" "arbitrators in the above cause, for" two thousand five hundred and fifty dollars, and is signed by the Judge. If this showed itself to be a decree of divorce, and to be rendered in a Justice's Court; or if it was a decree of discharge to an insolvent in the Superior Court of the city of San Francisco; or if there were any expressions in the

judgment which made it evident that no jurisdiction of the defendants was ever obtained; in all these cases, the want of jurisdiction would be evident, and the proceedings would be void. But our judgment is no such judgment; it is all regular on its face, and there is nothing to warn us of danger as *bona fide* purchasers.

There are two kinds of jurisdiction, to wit: jurisdiction of the subject-matter, which, having been limited by constitutional or legislative action, can never be waived, or increased or diminished, by agreement or laches of parties. Jurisdiction of the subject-matter can always be determined by inspection of the record of the judgment.

There is also a jurisdiction of the person; objections to which can be made when the defendant is a member of the Legislature, and process is served during the session; or when the defendant resides without the territorial jurisdiction of the Court, or is a citizen of another State, or is a foreign ambassador; or when there is a defect of service of process, or an irregularity in the summons; or when the defendant was not notified of the action in the manner prescribed by statute.

Objections to this kind of jurisdiction must be suggested to the Court, and if the defendant allows the proper time to pass, without insisting on the privilege to object to the jurisdiction of the Court over his person, he must be considered as having waived it. (*Davis v. Packard*, 6 Wend. 333, and authorities cited.)

The District Court is a Court of general jurisdiction, and of this there can be no doubt. (See Constitution and Statute.)

And every presumption is in favor of a Court of general jurisdiction; and if the want of jurisdiction does not appear on the face of the proceedings, jurisdiction must be presumed until the contrary is shown. And this is not our individual *dicta*, but is fully supported by authority.

This Court has adopted this rule in the case of *Newland v. Kean* (5 Cal. 105), where it says: "All intendments must be in favor of sustaining the action of the District Court," etc. (Also, in *Sepulveda v. Chapman*, 5 Cal. 174; also, *Grewell v. Henderson*, January Term, 1857.) And this Court is fully sustained in its decision by authorities from other States. As in the case of *Foot v. Stevens* (17 Wend. 485), this principle is fully explained.

[565] *But even if D. A. Cheever was never served with process, the judgment would not be void, but only, at most, voidable.

All these defendants were engaged as partners under the name of "Ralfe, Pierson & Co." In the worst view of the case, all the partners were before the Court but one, that was D. A. Cheever. And while, in such a case, it is error to enter judgment against Cheever, yet it is only error. And while it is error for one partner to confess judgment against himself and co-partner, it is only error, and is only voidable, but not void. And so it has been held that:

"Where service of process is had upon a part only of several defendants, and judgment is against the whole, such judgment is erroneous, not void, and a sale under such a judgment, while unreversed, is valid to a *bona fide* purchaser, and the title to land so sold passes." (*Douglas v. Massie*, 16 Ohio, 271.)

The Court had power to enter a judgment in this manner upon the award.

It seems the parties in this case adopted a primitive mode of adjusting their dispute. They referred to their friends and neighbors. This was often done at common law. It was done on a mere verbal statement, before the statute of William III., 3 Black. Com. 16.

The Court acquired jurisdiction in the case by the consent of parties; the parties not only consented to arbitrate the matters in dispute, but also consented that either party might carry the award into the District Court, and enter a judgment thereon without further trial or hearing. This is equivalent to a confession of judgment, and fully authorized the Court to enter the judgment under the Practice Act of 1850.

And this opinion is confirmed by this Court, in the case of *Gunter v. Sanchez*, 1 Cal. 48, BENNETT, Judge, an action which arose under this same Practice Act of 1850.

Cheever had a right to defend the action on its merits, by the twenty-seventh section of the Practice Act of 1850, which is as follows, to wit: "If the summons shall not be personally served on the defendant, he or his representative shall (except in actions for divorce), be allowed to defend after judgment, or at any time within one year after notice thereof, and within three years after its rendition, on such terms as shall be just; and if the defense be successful, and the judgment or any part thereof shall have been collected or otherwise enforced, such rendition may thereupon be compelled, as the Court shall direct."

The statute clearly contemplated that in case a judgment, by any accident or otherwise, should be rendered against a party without notice of some sort, or without personal service of the summons; that the Court wherein such judgment was rendered should have power to open the judgment within the time limited and for the cause specified, to wit: one year after notice, or *three years after rendition, if there has been no [566] notice; but for no other cause except to defend the action. And also that the Court should have the further power, not only to reverse the judgment, but to make all amends and repair all damages caused by the rendition of the judgment.

Sydney V. Smith, for Respondents.

The judgment of *Norman v. Cheever*, entered in the Eighth District Court, on October 11, 1850, and under which appellant claims title, was utterly void, and not voidable.

The appellants say that the jurisdiction of the Eighth District Court must be presumed. If nothing but the judgment and execution had appeared before the Court below, or before this

Court, such presumption would exist; but the rule of law is only that it is presumed "until the contrary be shown," and respondents have shown the contrary, by giving in evidence the whole of the proceedings prior to the judgment, and those proceedings show nothing by which the Court acquired jurisdiction, as against Cheever, even if it acquired jurisdiction as against the other defendants.

Now, it cannot well be presumed that the record certified by the clerk, as the whole record (such certificate made only nine months after the judgment was rendered), was defective; whether defective or not, the effect of it was to shift the presumption, or burden of proof, over to appellant, and force him to prove that the Court had acquired jurisdiction in some way or other than that which the record of July, 1851, showed.

When the cause in question was before this Court, in 1852; on appeal from this very judgment (see *Pierson v. Norman*, 2 Cal. 599), the same record came up, and no other, as is shown by the facts reported in that case, with this additional fact, however, which does not appear in the record in this cause, that the agreement to build the ten-pin alley, the agreement to arbitrate, and the award of the arbitrators, were all filed in Court on the very same day that judgment was rendered, viz: October 11, 1850.

It is under such a judgment alone that defendant founds his right to recover.

Thus, without notice, or opportunity of being heard, without consent, without a day in Court, it is claimed that the title of Cheever can be taken from him. If the other defendants had been part-owners of the property, a different question would arise, but the property belonged to Cheever alone.

The eighth section of article first of the Constitution prescribes that "no person shall be deprived of life, liberty, or property, without due process of law."

Judge BRONSON, in *Bloom v. Burdick*, 1 Hill, 139, uses the following language: "It is a cardinal principle, in the administration of justice that no man can be condemned, or divested of his right, until he has had the opportunity of being heard. He must, either by serving process, publishing notice, appointing a guardian, or in some other way, be brought into Court; and if judgment is rendered against him before that is done, the proceeding will be as utterly void as though the Court had undertaken to act where the subject-matter was not within its cognizance. This is the rule in regard to all Courts, that the jurisdiction of a superior Court will be presumed until the contrary appears; whereas an inferior Court, and those claiming under its authority, must show it had jurisdiction." "The distinction between superior and inferior Courts is not of much importance, in this particular case, for whenever it appears that there was a want of jurisdiction, the judgment will be void in whatever Court it was rendered."

All the decisions which have been made for the protection of

purchasers, were in cases where the Court had jurisdiction; but there was error or irregularity in the proceedings, and even in these cases such protection has only been accorded to *bona fide* purchasers, which the judgment-creditor, such as Norman is in this case, has never been held to be.

In other words, the cases have been where the judgment was a voidable and not a void one. But it has never been held, and never will be, that a purchaser can be protected under a judgment entered by a Court, without notice to defendant of any kind, actual or constructive, and without the opportunity of being heard in his defense.

Thus, in *Smith v. The State*, 13 Smedes & Marsh. 140, it was held that where the judgment was void, the *bona fide* purchaser took no title.

Admitting that Cheever subsequently appeared in the Eighth District Court, by his counsel, Mr. Swezy, that act did not confer jurisdiction on that Court, so as to make that valid which was before utterly null; the more especially as he appeared there (as is shown by the record) for the express purpose of excepting to the jurisdiction of the Court, on the very ground now taken, viz: that the judgment had been entered without notice to him, or opportunity of his being heard.

But even supposing that Pierson, Ralfe, and Ruth were properly in Court, under their agreement to that effect, still, a judgment entered against Cheever with them, did not render the judgment less void as to him.

Thus, in *Hulme v. Janes*, 6 Tex. 242, (a still stronger case than this,) a suit had been regularly entered against three defendants, two of whom were duly served, but no service was in any manner had against the third. Judgment by default was entered against all three. The Supreme Court not only held the judgment absolutely void, as against the defendant not *served, but [568] also void against the two served, on the ground that it was indivisible in its nature.

The present proceedings were had while the Practice Act of 1850 was in force, and in that law there were no provisions for entry of judgment against all the defendants, on a joint-contract, where all were not served, such as are found in the Practice Act of 1851, section thirty-two, and chapter first of title ten; and even under the latter Act the joint-judgment in such case is only against the joint-property of all, and not against the separate property of the defendant not served.

Respondents do not deem it necessary to follow appellant throughout the course of his argument.

It is all based upon an erroneous hypothesis, namely: that the judgment against Cheever was a voidable, and not a void one.

The judgment being a void one, it was not necessary that Cheever should have noticed it in any way. A void judgment can be attacked at any time, in any proceeding, direct or collateral, and it is not necessary that the power of an Appellate

Court should be invoked. This proposition needs no authority to support it.

But Cheever did resort first to the Court below, for its assistance, which was refused, and afterwards to this Court, as before stated, asking it to decide the question of jurisdiction; and that this Court did not then do him the full justice which they would have done him, if they had had all the facts of the case before them, can surely not now be alleged against him, or against his grantee, the respondent Gavard, in this case.

This Court is now asked, in this collateral proceeding, where that judgment is attacked by a *bona fide* purchaser from Cheever, to give such a decision as shall put an end to all questions of adverse title derived under Norman's pretended judgment.

BURNETT, J., after stating the facts, delivered the opinion of the Court—TERRY, C. J., concurring.

The only question in the case regards the validity of the judgment under which the premises were sold. If *void*, the sale was invalid, and the sheriff's deed conveyed to the purchaser no title. On the other hand, if the judgment was merely voidable, the sale was valid.

To sustain a *personal* judgment, the Court must have jurisdiction of the subject-matter and of the person. (*Whitwell v. Barbier*, 7 Cal. 54.) Where the jurisdiction of the Court as to the *subject-matter* has been limited by the Constitution or the statute, the consent of parties cannot confer jurisdiction. But when the limit regards *certain persons*, they may, if competent, waive their privilege, and this will give the Court jurisdiction. If, however, a party has not been brought into [569] *Court, and does not of himself come in and waive the necessity of service, the Court has no jurisdiction over him, and the judgment against him is a nullity.

The learned counsel for the plaintiff insists that the District Court was a Court of general jurisdiction; that every presumption is in favor of the proceedings of such Courts; and, unless the want of jurisdiction appears on the face of the record, the judgment must be sustained. This position is, no doubt, correct. The judgment was *prima facie* good. The proof introduced by plaintiff was ample to throw the *onus* upon the defendants. But when they produced the record of the entire case, it presented a new feature. From the record, it did not appear that Cheever ever had any notice of the submission, or of the award, or of the judgment, until he came in afterwards, and moved to set aside the same, for the very reason that he had not been properly brought into Court. The fact that he did not join in the submission is a proof that he was ignorant of the whole matter.

When the entire record did not show that Cheever was brought into Court, the proof was sufficient to rebut every presumption in favor of the jurisdiction. The statute provides a way in which parties shall be brought into Court. If that mode

is not followed, they cannot be brought into Court in any other way. They may come in voluntarily. The record must then show, either that the party was summoned in the mode provided, or that he appeared in Court. If records or papers are lost, their contents may be proved.

The appearance of Cheever in the Court after the judgment was rendered, and his motion to set it aside, did not cure the fatal defect of a want of jurisdiction. Had the Court set aside the judgment, and permitted him to answer to the merits, a judgment subsequently rendered would have been valid. But the appearance of a party for the purpose of objecting to the prior void proceeding, will not cure it. (*Diedesheimer v. Brown*, ante 339.)

The authorities referred to, and quoted in the able brief of plaintiff's counsel, do not sustain the judgment. Nor does the fact that the judgment was reversed in this Court upon a ground that would only render the judgment voidable, at all affect the rights of the defendants. There may be several grounds upon which a judgment should be reversed. The reversal upon one ground, does not prove the non-existence of another.

It is unnecessary to express any opinion as to whether the judgment was void, or voidable, as against the other parties. The property sold was the individual property of Cheever, and the judgment being void as against him, the plaintiff's deed conveyed no title.

Judgment affirmed.

*DIXEY v. POLLOCK.

[570]

ATTACHMENT, IRREGULARITY IN ISSUANCE OF.—Where an attachment was issued on a complaint, which was a printed form, with the blanks filled up by the clerk, at the request of plaintiff, but no name signed to it till next day, and after other attachments on the same property, when it was signed by the clerk, with the name of plaintiff's attorney: *Held*, that the action of the clerk, though not correct, was only an irregularity, and the complaint was not void.

¹ **IDEM.**—WHO CANNOT COMPLAIN.—In a contest between the attaching creditors, all the equities are in favor of the most diligent, and an irregularity cannot be taken advantage of by a stranger, to the action in which it occurs.

ATTORNEY IN FACT—RESTRICTION AS TO POWER.—An attorney in fact, who is not an attorney at law, cannot sign his name to a complaint for his principal, as "plaintiff's attorney," and an action so commenced is void, as instituted without authority, and by an entire stranger to the plaintiff.

² **CREDITORS, RIGHTS OF.**—The application of an attaching-creditor, to compel the sheriff to pay over the proceeds of goods attached, there being conflicting claims between several attaching-creditors, may be made by motion. If notice of the motion is not given, by the party moving, to the other attaching-creditors, it is the duty of the sheriff to do so, if he wishes the decision to bind them.

1. Cited *Fridenberg v. Pierson*, 18 Cal. 155.

2. Cited *Davis v. Eppinger*, 18 Cal. 381; *Speyer v. Ihmels*, 21 Cal. 287; *McComb v. Reed*, 28 Cal. 287.

APPEAL from the Superior Court of the City of San Francisco.

This was a motion in the Court below, by the plaintiff, for an order requiring the sheriff to pay over to plaintiff the proceeds of goods attached in this action.

There were two prior attachments upon the same goods, one in the suit of *R. H. Adams v. Pollock*, and the other in the suit of *John Pollock v. Pollock*, all the suits being brought against the same defendant. The plaintiff claims that the prior attachments were void for irregularity. The plaintiffs in all the cases, had obtained judgment prior to the motion.

In the case of *Adams v. Pollock*, the complaint used was a printed blank, and the blanks were filled up by the clerk, at plaintiff's request. No name was signed till after the attachment in the case at bar had been levied. The next day the clerk signed the complaint, "R. M. Adams, plaintiff's attorney."

In the case of *Pollock v. Pollock*, the complaint was subscribed "R. H. Adams, plaintiff's attorney." R. H. Adams was the attorney in fact of the plaintiff in that action, but not an attorney at law.

No notice of motion was served on the plaintiffs in the suits of *Adams v. Pollock*, and *Pollock v. Pollock*.

The Court below denied the motion, and plaintiff appealed.

Bristol & Spencer, for Appellants.

The appellant claims that he is entitled to the money in the hands of the sheriff, on the ground that the proceedings prior to the attachments in the cases of *Adams v. Pollock* and *Pollock v. Pollock*, were irregular, and, therefore, as to this plaintiff, void; and he claims that such proceedings are void because no sufficient complaints were filed in the said two cases.

[571] *An attachment cannot issue until after suit is commenced. (Pr. Act, sec. 120.)

Filing complaint and issuing of summons is commencement of action. (Pr. Act, sec. 22.)

Every pleading must be subscribed by the party or his attorney. (Pr. Act, secs. 38, 51.)

It was suggested by the Court, on the argument, that unless the complaint was either written or signed by the party or his attorney, that it would be insufficient, and that the attachments would be void.

In other words, that if a party wrote a complaint himself, in which his name occurred, that this might be a sufficient signing or subscribing of it, and bring it within the statute.

But suppose he did write them, and that the complaint, in which his name appears as a party plaintiff; written by himself, is, under the statute, a good commencement of the action, without any subscribing, yet how stands the case with the suit of *John Pollock v. D. H. Pollock*?

In this last named case Adams is not the party, nor is he the attorney of the party. Adams cannot be the attorney, because

he is not admitted to practice as an attorney in any Court in this State.

The most that Adams could do, as the attorney in fact for John Pollock, was to employ some attorney to bring an action.

Then, we say, according to the most liberal interpretation of the intimation of the Court, there can be no possible way in which we can look upon the paper in the case of *Pollock v. Pollock*, as a complaint. It was neither written nor signed by either the party himself or his attorney.

In other words, can the Court say that a complaint may be good when it lacks any one of the qualities which the statute shall possess?

If the Court can say that it may lack one, have they not the same right to say that it may lack two, or all of the requisites? (See *Benedict v. Bray*, 2 Cal. 254.)

G. F. & W. H. Sharp, for Respondent.

1. The appellant's remedy, if he has one, is by action, not by motion. The parties in the prior attachment suits not having been before the Court in this proceeding, if the Court below had ordered the sheriff to divert the funds, it would have been no defense for him, in an action by those plaintiffs against him for a false return. They were, in no sense, parties to this suit, and could have taken no steps in it, by appeal or otherwise; hence, the plaintiff should have commenced his action against them before he could invoke the power of a Court over their persons or rights. The whole proceeding was so revolting to reason that *it is without precedent or authority. (*The [572] People v. Tallmadge*, Cal.)

2. Conceding the Court had jurisdiction over the prior attaching creditors, the determination of the Court was right, because the attachment is not based upon the complaint, and its vitality is not dependent upon it. (Code, secs. 120, 121 and 122.)

3. Even if it were, the complaint filed supported the attachment, because it is conceded that the only defect in it was a proper signing. The signing is no part of the complaint itself. (Code, sec. 39.)

4. The want or lack of a proper signing to the complaint, at most, is a simple irregularity, and affects no other pleading or proceeding in the suit. (*Launbeer v. Allen*, 2 Sand. S. C. R. 648; *Webb v. Clarke*, 2 Code Rep. 16; *Gilmore v. Hempstead*, 4 Pr. Rep. 153; *Graham v. McCann*, 5 Pr. Rep. 353; 12 Wend. 424.)

5. The defendant only can take advantage of an irregularity, and the defendant himself is estopped from so doing after answer and judgment. (Code, sec. 45; cases before cited.)

6. The defendant being estopped, the appellant is, also, because his rights cannot be enlarged beyond those of the defendant.

7. A subsequent attaching creditor can invoke fraud only to defeat a prior attachment lien, and this by suit only in equity.

Fraud is not even pretended in this case. (*Kincaid v. Neall*, 2 McCord, 201; also, 1st McCord, 116; *Camberford v. Hall*, Id. 345; *McBride v. Floyd*, 2 Bailey, 214; *Van Arsdale v. Krum*, 9 Mo. 397; *Walker v. Roberts*, 4 Rich. 566.)

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

Motion by plaintiff, requiring the sheriff to pay over to him the proceeds of certain goods attached by the sheriff under three separate writs, the last of which was that of plaintiff.

In the case of *R. H. Adams v. D. H. Pollock*, the complaint was a printed blank, and the blanks were filled up by the clerk of the Court at the request of the plaintiff, but no name was subscribed at the end of the complaint until the next day, and after the attachment of Dixey was duly levied upon the same goods. It was then signed by the clerk, in this way, "R. M. Adams, plaintiff's attorney." It does not appear, with certainty, whether the blanks in the complaint were filled up and the name signed in the presence of Adams or not. It is most probable, from the affidavits, that the blanks were filled up in his presence, and the name subscribed in his absence.

Under our system of practice, an action is commenced by the filing of a complaint, and every pleading must be subscribed by the party or his attorney. It is insisted by the plaintiff that the complaint in the case of Adams was not subscribed, and was, therefore, void, and the attachment could not issue.

[573] *It has been held that a note written by a party beginning, "I, A. B., promise to pay," was good, though no name was written under it. So it has been held that if a party request another in his presence to write his name for him it is sufficient. In this case, we think the complaint was not void. The conduct of the clerk in filling the blank was not correct; but still it was a mere irregularity. And it is well settled that a stranger cannot interfere upon the ground of irregularity. When the contest is between creditors, all the equities are in favor of the most diligent. The subsequent execution or attachment-creditor can claim no equitable relief. If the proceedings of the prior creditor are not void, but voidable, the defendant can alone object. (9 Miss. 393; 2 Bailey, 214.)

In the case of *John Pollock v. D. H. Pollock*, the complaint was subscribed, "R. H. Adams, plaintiff's attorney." In this case, the blanks were also filled up by the clerk at the request of Adams, who, it appears, was not a licensed attorney, but was the attorney in fact of John Pollock. This case differs very materially from the case of *Adams v. Pollock*. Adams, as the attorney in fact of John Pollock, had no authority to conduct the proceedings, as he was not an attorney at law. He could, no doubt, have employed counsel to bring the suit; but it certainly was not competent for him to act as attorney at law for John Pollock. The power given him by the latter certainly did not contemplate any such thing. The complaint was drawn and

filed by a party who had no authority to do so, and was not subscribed, either by the plaintiff or by his attorney, and the suit must be considered as having been instituted by an entire stranger to John Pollock, and wholly without authority, and, therefore, void.

It is objected by the counsel of the sheriff that the remedy of plaintiff, if any, is by action, and not by motion. This, we think, is not correct. (8 How. Pr. 77.)

It is also objected, on the part of the sheriff, that Adams and John Pollock were not served with notice of the motion. This was not necessary. If the sheriff wished to make the decision of the Court binding against the other attachment-creditors, he should have given them notice.

Our conclusion is, that the proceeds should be first applied to the execution in the case of Adams, and then to the debt of the plaintiff, Dixey, leaving John Pollock to his remedy, if any, against his agent.

Judgment reversed, cause remanded, and the Court below will make an order in conformity with this opinion.

*POTTER v. CARNEY ET AL.

[574]

EXCEPTIONS TO EVIDENCE, WHEN TO BE TAKEN.—Objections to evidence must be stated in the Court below; they cannot be taken in this Court for the first time.

NEW TRIAL, WHEN GRANTED.—Where the evidence is insufficient, a new trial should be granted.

APPEAL from the Superior Court of the City of San Francisco.

Potter, the plaintiff, sued the defendants for the possession of certain premises in San Francisco, alleging that Carney & Carson entered under a lease from him, and that Carson, in fraud of his rights, had conveyed to his co-defendants one half of the premises. The plaintiff also alleged generally that he was the owner of the premises, and entitled to the possession.

The Court below submitted two issues to the jury:

1. Whether Carson & Carney had executed the lease.
2. Whether plaintiff had prior possession.

The evidence as to the execution of the lease was conflicting, and as to prior possession, it was hearsay. No objection was taken to its introduction.

The jury found the following verdict:

“We, the jury, find for the plaintiff, from the evidence before us as to priority of possession, and that the lot is worth over two hundred dollars.”

On this verdict the plaintiff had judgment. Defendants failed in the motion for a new trial, and then appealed.

E. R. Carpentier, for Appellant.

Channing G. Fenner, for Respondent.

TERRY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

This was an action for the recovery of a lot in San Francisco. Two issues were made by the evidence: First, the execution of a lease by defendants. Second, the question of prior possession.

On the first issue there was conflict of testimony, and the jury, by implication, found for the defendants, as their verdict for plaintiff is based solely upon the ground of prior possession.

It is contended by the appellants, that under the pleadings, no evidence of prior possession was admissible, and there would be force in the objection, if an exception to such evidence had been taken on the trial; this was not done, and the objection cannot be raised here for the first time.

It is clear, however, that the evidence on this point is entirely insufficient to sustain the verdict, and that the Court erred in refusing a new trial.

Judgment reversed, and cause remanded.

[575]

* TURNER v. McILHANEY ET AL.

PARTNERSHIP, EVIDENCE OF, COMMON REPORT.—In an action against a partnership, and in order to prove that one of the defendants was a partner, it is incompetent to ask a witness whether, from what he saw, while working for the firm, and from the acts of the particular defendant during that time, he was a partner. It does not amount even to evidence of common report.

IDEM.—WHEN ADMISSIBLE.—Common report can only be admissible to prove a partnership, first, in corroboration; and, second, to prove knowledge of it on the part of the plaintiff.

• **¹ EVIDENCE.—DEFECT OF PROOF, HOW CURED.**—Defect of proof may be cured by testimony introduced by the adverse party.

IDEM.—DEPOSITION ADMISSIBLE.—A deposition of one of the defendants, introduced by plaintiff on trial, may be introduced by the defendants on a new trial.

IDEM.—INCOMPETENCY OF WITNESS WAIVED.—The party who calls on an adverse party to testify, makes him a witness, and waives his incompetency to be heard for himself or for his co-defendant, or co-plaintiff.

APPEAL from the District Court of the Tenth Judicial District, County of Yuba.

This was an action upon two promissory notes, in which the plaintiff obtained judgment against all the defendants, except the defendant Hooper, who had a verdict and judgment in his favor, from which the plaintiff appealed. The only question in the case, as between the plaintiff and Hooper, was, whether the latter was a member of the firm at the time the notes were executed.

On the trial in the Court below, the defendant Hooper introduced a witness, to-whom his counsel propounded this question:

"Please state, judging from what you saw on the ranch in 1853, whilst working for McIlhaney & Co., and from all Hooper's acts that year, whether the said Hooper was a partner in the firm of McIlhaney, Thomas & Co., or not."

To this question the plaintiff objected, on the ground that it was asking the witness to state the inference or conclusion he drew from certain facts, instead of stating the facts themselves.

The objection was overruled, the testimony admitted, and the plaintiff excepted, and this is one of the errors assigned.

The other error assigned is the admission of the deposition of Thomas, one of the defendants, introduced by the defense. The deposition had been taken by the plaintiff, and was read by him on the former trial of this cause. It was taken by consent, to be used on the trial, subject to all legal objections, as if taken upon an order of the Court, and upon due notice.

Field, for Appellant.

First.—The Court below erred in allowing the witness Hubbs to state the inferences or conclusions he drew, as to Hooper's partnership in the firm of McIlhaney, Thomas & Co., from certain facts, instead of stating the facts themselves.

It certainly will not require any argument to establish the error of the Court, in its ruling on this point. The judgment of the witness may have been unauthorized by the [576] facts. This is not one of those cases where the opinion of a witness is admissible. The opinions of witnesses are admissible only when they relate to subjects of science or art, or to skill in some particular business.

Second.—The Court below erred in admitting in evidence the deposition of Charles C. Thomas, one of the defendants. The deposition was objected to on the ground that Thomas was a party to the action, and that therefore his deposition was inadmissible, either for himself or his co-defendants, but the Court held that under the four hundred and thirty-first section of the Practice Act, the deposition could be read, and it was accordingly read. The plaintiff excepted to the ruling of the Court. The deposition was taken under the following stipulation:

We consent that the following depositions of Edward McIlhaney and C. C. Thomas may be used and read, on the trial of the above action, subject to all legal objections, as if taken upon an order of Court, and upon due notice.

R. S. MESICK,

Plaintiff's Attorney.

ROWE & HAUN,

Edward Hooper's Attorney impleaded, etc.

The stipulation does not waive any objections to the admissibility of the deposition; on the contrary, it expressly reserves "all legal objections."

Its language is that it "may be used and read on the trial of the above action, subject to all legal objections, as if taken upon an order of Court, and upon due notice." The true meaning of the stipulation is this: that the deposition might be read on the trial, as if taken upon an order of the Court, provided there were no valid objections to its admissibility. It is similar in language to nearly all stipulations given when depositions are taken. The parties do not, at the time, undertake to decide upon their admissibility, but, reserving all objections, waive, for their mutual convenience, that which is mere matter of form.

Nor is there anything in section four hundred and thirty-one of the Practice Act, upon which the District Judge seemed to have based his ruling that would justify the admission of the deposition, if otherwise inadmissible. That section reads thus:

"When a deposition has been once taken, it may be read in any stage of the same action or proceeding, by either party, and shall then be deemed the evidence of the party reading it."

The object of this section is, as it purports on its face to be, to enable a party to read a deposition, admissible in itself, once taken, in any stage of the same action or proceeding—not to render it admissible from the mere fact it has been once [577] taken. *If the construction contended for were correct, it would be in the power of a party to introduce the testimony of any witness, however incompetent or interested, by simply taking it by deposition. The statute says, once taken, it may be read "by either party." Such a construction would break down all the rules of evidence applicable to oral testimony given in open Court, when applied to testimony taken by deposition, and would lead to manifest and manifold legal absurdities.

If this view of section 431 be correct, then the only question for consideration is, whether the deposition of a defendant, taken by order of Court, is admissible for his co-defendants. On this question there can be no doubt, both upon principle and authority, that it is inadmissible.

The decision of this Court, in the case of *Sparks v. Kohler*, 8 Cal. 300, was based upon the four hundred and twenty-third section of the Practice Act of 1851, which was amended in 1854. (See Session Laws of 1854, 67; Pr. Act, Sec. 392; 1 Greenleaf, Secs. 329, 330; *Gates v. Nash*, April T., 1856; *Wolf v. Fink*, 1 Penn. St. 440; *Bridges et al. v. Armour*, 5 How. 94; *Supervisors of Chenango v. Birdsall*, 4 Wend. 457; *Fox v. Administrator of Whiting*, 16 Mass. 121.)

But it may be urged that Hooper himself, when called on the stand, testified that he was once a member of the firm of McIlhane, Thomas & Co., but was not a member at the time the notes sued upon were given, and that therefore the deposition of Thomas was immaterial. To this I answer:

1. That Thomas testified to much more than Hooper, which was material to the case.

2. That the jury may not have believed the testimony of

Hooper, particularly as it was in direct contradiction, in one respect, with that of Thomas.

3. There was error, which entitles the appellant to a reversal, if illegal evidence was admitted, which bears in the least degree on the question in issue.

In *Worrall v. Parmelee*, 1 N. Y. 519, Chief Justice JEWETT, in rendering the opinion of the Court of Appeals, says:

"There are many cases which hold that an error in the Court below, which on its face, and by legal necessity, could do no injury, is not cause for a reversal of the judgment. But when the error is in the admission of illegal evidence which bears in the least degree on the question in issue, it cannot be disregarded."

See, also, *Marguand v. Webb*, 16 John. 90; *Osgood v. President and Directors of the Manhattan Co.*, 3 Cow. 612.

When a case comes up to this Court, on a statement made on appeal from a judgment, errors must be examined and determined, as upon a bill of exceptions. But when the case comes up on appeal from an order granting or refusing a new trial, it is different. In the latter case, the Court may [578] disregard the erroneous ruling, as to the admissibility of the evidence, if the facts would by such testimony, have been proved or established by other evidence. The reason of this distinction is this: that in the latter case, the motion for a new trial is addressed, in a certain extent, to the discretion of the Court. (See *Weeks v. Lowerre*, 8 Barb. 530.)

Bryan & Filkins, for Respondents.

A partnership may be proven by common report or general reputation. (2 Greenleaf, 483.)

From the necessity of the thing, proof, by general reputation of partnership, must be admitted.

But again, the plaintiff could not be injured by the admission of the testimony, because he has failed, on his part, to prove Hooper a copartner when the notes were given.

The *onus probandi* is on him to show that Hooper was a copartner at the time.

This he failed to do, and he could, therefore, in no event, be injured by the admission of the above question and answer.

The second point made by appellant's counsel is equally tame. Page 13 of record shows the fact that defendant, Hooper, offered to read, and did read a deposition of C. C. Thomas, a co-defendant, which deposition was taken by plaintiff on notice, and which was read by plaintiff at a former trial of this cause—the Court allowing the same to be read under the four hundred and thirty-first section of the Practice Act.

This proceeding was entirely regular. The plaintiff having taken the deposition and used it, certainly could not object to our reading it for ourselves. The object of that section was most clearly to allow the very thing to be done which has been done. It says so in language which cannot be mistaken.

The cases cited upon appellant's brief do not apply to this case, the statute being our guide, and so plain and simple in its meaning as to not allow of more than the one interpretation. This, then, is all that there is in the case.

BURNETT, J., after stating the facts in the case, delivered the opinion of the Court—TERRY, C. J., concurring.

It is the general rule that a witness must state facts, and not opinions, inferences, or conclusions. The exceptions to this rule are few, and relate mostly, if not entirely, to the opinion of experts, in reference to questions of science and skill. This, however, was not a case of that kind.

In answer to this point, the learned counsel for the defendant Hooper, insist that such testimony is admissible to prove partnership. "A partnership," they say, "may be proved by common report or general reputation." (2 Greenleaf, 483.)

[579] *But the authority referred to does not sustain the position taken. The learned author says:

"But evidence of general reputation, or common report, of the existence of a partnership, is not admissible, except in corroboration of previous testimony; unless it be to prove the fact that the partnership, otherwise shown to exist, was known to the plaintiff."

It will be seen that common report can only be admitted for two purposes: First, in corroboration; and, second, to show knowledge on the part of the plaintiff. But in this case the evidence was not offered for such a purpose, nor did the evidence itself relate to common report, but to the opinion or inference of the witness himself.

The question was improper at the time when put, but we think the error was cured by the testimony of the plaintiff in rebuttal, by which it was conclusively shown, by plaintiff's own witness, that Hooper was not a partner at the time the notes were given. It has often been held that a defect of proof may be supplied by the testimony introduced by the adverse party. The same principle will cure the error committed by the introduction of improper testimony, when the party objecting himself afterwards introduces proper evidence, clearly establishing the same fact. The true rule seems to be this: that when the jury, *after excluding* the improper testimony, could not have properly found a different verdict—and if they had, the Court should have granted a new trial—then the party objecting to the testimony is not injured.

The next point raised by the counsel of plaintiff relates to the admission of the deposition of Thomas, one of the defendants. This deposition had been taken by the plaintiff, and by him read on a former trial of this case. At the late trial the deposition was read by the defendant, Hooper, and objected to by the plaintiff.

It was held by this Court, in the case of *Gates v. Nash*, 6 Cal. 192, and in the case of *Lucas v. Payne*, 7 Cal. 92, that a plaintiff

or defendant could not be permitted to testify on the part of his co-plaintiff or defendant.

But the counsel for the defendant insists that after a deposition of one defendant has been taken by the plaintiff, then, under the four hundred and thirty-first section of the Practice Act, a co-defendant can read a deposition as evidence on his part. That section provides that "when a deposition has been once taken, it may be read in any stage of the same action or proceeding by either party, and shall then be deemed the evidence of the party reading it."

We think the intention of this section is that which its language plainly expresses. The defendant had the right to read the deposition. If it were otherwise, and a party should [580] be allowed to take the deposition of any one or more of the adverse parties, and read, if it suited him—and if it did not, then to exclude it from the other side—the result would be that a party, plaintiff or defendant, could always be fishing for evidence from adverse parties, without incurring any responsibility or danger on his part. The party who calls upon an adverse party to testify, makes him a witness. By making him a witness, he waives his incompetency to be heard for himself, or for his co-defendant, or co-plaintiff.

Judgment affirmed.

HARWOOD v. MARYE ET AL.

ADMINISTRATOR ENTITLED TO POSSESSION OF PROPERTY.—In this State, all the property, both real and personal, belonging to the estate of a deceased person, goes into the possession of the administrator, who is therefore a necessary party to all suits affecting it.

APPEAL from the Superior Court of the City of San Francisco.

The plaintiff filed his bill against George T. Marye and Wm. Smith, to foreclose a mortgage made by G. T. Marye and J. Caleb Smith, now deceased. The complaint alleges that William Smith is the heir of J. Caleb Smith, and asks for an order of service of summons by publication upon him, which was granted, and service so made. Judgment by default was entered in favor of plaintiff. Defendants appealed.

Howard & Gould, for Appellants.

Fabens & Tracy, for Respondent.

TERRY, C. J., delivered the opinion of the Court—BURNETT, J., and FIELD, J., concurring.

This action was instituted to foreclose a mortgage on land executed by George F. Marye and J. Caleb Smith.

The complaint, after setting out the note and mortgage sued on, alleges that Smith, one of the mortgagors, is dead; that one William Smith, a resident of Virginia, is his heir, and asks that service be made on the heir, by publication; which was done.

It does not appear whether there was any administrator of the estate of Smith; the plaintiff seems to have proceeded under the idea that the heir was the only person interested in or capable of exercising control over the real estate of the deceased.

This doctrine never obtained in California. By our statute "regulating the settlement of estates," all property of the deceased, both real and personal, goes into the possession [581] of the *administrator. The administrator being entitled to the possession of the real property, must be made a party to all suits affecting it. The complaint is therefore defective for want of proper parties.

Judgment reversed, and bill dismissed.

HENDERSON v. GREWELL.

1. ACKNOWLEDGMENT, WHAT MUST SHOW.—Acknowledgments to a deed should show that the officer knew the person, and that such person acknowledged to him that he executed the deed.

POSSESSION, ENTRY INTO.—Parties having the title, and the present right of possession, can always enter peaceably into the possession of premises, and cannot be held liable for so doing, in trespass or ejectment. If he uses force, the remedy is by forcible entry and detainer.

IDEM.—The plaintiff having entered into possession under S. M. H., and in subordination to his title, cannot question S. M. H.'s right to execute the mortgage or agreement, which conferred the right of re-entry upon defendant.

APPEAL from the District Court of the Third Judicial District, County of Santa Clara.

This was an action of ejectment brought by the plaintiff, W. L. Henderson, to secure the possession of a tract of land in Santa Clara county. The evidence shows, that one Samuel Henderson, in November, 1852, purchased the land in controversy of the defendant; that the purchase was made principally upon credit; that at the time of said purchase, he was put in the possession of the land by Grewell, the defendant; that when he went into the possession thereof, his brother, the plaintiff, went with him, and resided on said land, with the understanding that the two should work the land on joint account; that shortly after they thus were in possession, Samuel Henderson abandoned the place, in June, 1853, and went into a different part of the state to reside; that plaintiff remained in full possession of the premises until June, 1855, when he was ejected by defendant; that when Samuel Henderson left the land, he, without the knowledge of plaintiff, attempted to execute a mortgage on the land to Grewell, to secure the unpaid purchase-money, which was as follows:

This indenture, made the 4th day of January, 1854, between

1. Cited *Overman S. M. Co. v. American M. Co.*, 7 Nev. 318.

Jacob Grewell of the first part, and Samuel M. Henderson of the second part, witnesseth: That the said party of the first part, for, and in consideration of, the sum of twenty-five hundred dollars to him in hand paid, the receipt whereof is hereby acknowledged, hath bargained, sold, and confirmed, and by these presents doth bargain, sell, and confirm, unto the said party of the second part, and to his heirs and assigns forever, all that certain tract of land situate and bounded as follows, to wit: On the north, by Dr. Bascom's claim, on the east by Mr. Edwin Knapp's claim, *on the south by Austin's claim, [582] on the west by Asa Grewell's claim.

To have and to hold the above-bargained premises to the said party of the second part, his heirs and assigns, to the sole and only proper use, benefit, and behoof of the said party of the second part, his heirs and assigns, forever.

Provided, always, and these presents are upon the express condition, that, if the said party of the second part pay to the said party of the first part the just and full sum of twenty-five hundred dollars, on or before the 1st day of May, which will be in the year A. D. 1854, with lawful interest until paid, according to the condition of two several notes, bearing even date herewith, executed by the party of the second part to the party of the first part, then these presents and the said notes shall cease and be null and void.

But in case of the non-payment of the said sum of twenty-five hundred dollars, or any part thereof, so to become due at the time or times above limited for the payment thereof, then, in every such case, it shall and may be lawful for the said party of the first part, his heirs, executors, administrators, or assigns; and the said party of the second part doth hereby empower and authorize the said party of the first part, his heirs, executors, administrators, or assigns, to enter and possess the aforesaid premises, with the appurtenances thereunto belonging.

Made and subscribed in the State of California and county of Santa Clara, on the fourth day of January, A. D. eight hundred and fifty-four.

In witness, I hereunto affix my hand and seal.

SAMUEL M. HENDERSON. [L.S.]

STATE OF CALIFORNIA,
County of Santa Clara. }

Be it remembered, that on this 4th day of January, A. D. 1854, personally appeared before me, the undersigned, Notara Publick within and for the County and State aforesaid, Samuel M. Henderson, personally known to me to be the identical person whose name is subscribed to the foregoing instrument of writing, and acknowledged the same to be his signature, and that he executed the same for matters and things therein contained.

Given under my hand and seal the day and year above written, "turn over for the same."

CASTELL DAVIS, Notara Publick.

Filed for record at 5½ o'clock, P. M., January 4, 1854, and recorded in Book B of Mortgages, pages 169 and 170.

S. A. CLARK, Recorder.

By F. LEWIS, Deputy.

[583] *Afterwards, on the 2d of November, 1854, Grewell commenced an action against Samuel Henderson, in the District Court to foreclose this pretended mortgage. The plaintiff was not a party to this suit. The summons therein was served by publication, and on the 27th of April, 1855, judgment was had by default, and a decree rendered for the sale of the land, and that the sheriff should put the purchaser into possession. From this judgment Samuel Henderson appealed to this Court, and while said appeal was pending, the sheriff, under the decree, sold the land to defendant, and put him into possession by ousting plaintiff. This was prior to the expiration of the six months allowed for redemption.

The judgment in the case of *Grewell v. Henderson*, was afterwards reversed by this Court, on the ground that the publication of notice was insufficient.

On the trial of this cause the defendant introduced in evidence the judgment-roll and proceedings in the case of *Grewell v. Henderson*, which embraced the instrument or mortgage, and relied upon both the decree in that case and the instrument in writing, to justify his re-entry upon the premises, and his ouster of plaintiff. The Court, among others, gave the following instruction to the jury, under the exception of defendant's counsel:

"That the instrument read in evidence, purporting to be a mortgage, was not in law a mortgage; and that it was not properly acknowledged; and that, although recorded, it was insufficient to impart notice to the plaintiffs of its contents."

The jury found a verdict for the plaintiff. Defendant then moved for a new trial, which being granted, plaintiff took this appeal from the order granting a new trial

H. M. Voorhies, for Appellant.

W. T. Wallace, for Respondent.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

This was an action of ejectment. There are several questions raised in the case, but the decision of one or two points will render any notice of the others unnecessary.

The first question regards the sufficiency of the certificate of the notary, wherein he states that Samuel M. Henderson was "known to him to be the identical person whose name is subscribed to the foregoing instrument of writing, and acknowledged the same to be his signature, and that he executed the same for matters and things therein contained."

It is well settled that the exact form of the certificate given *in the statute need not be followed. All that is [584] necessary, is a substantial compliance with the statute.

The seventh section provides that the certificates shall "state the fact of acknowledgment, and that the person making the same was personally known to the officer granting the certificate to be the person whose name is subscribed to the conveyance as a party thereto, or was proved to be such," etc.

Under the provisions of this section, there are two essential facts that must be stated in the certificate:

1. The fact of acknowledgment.
2. The identity of the person.

The fact of acknowledgment must be stated. (*Bryan v. Ramirez*, ante 461.) The identity of the party must be stated. (*Kelsey v. Dunlap*, 7 Cal. 160.) The word "personally" need not be inserted, because not found in the statutory form. (*Welch v. Sullivan*, ante 165.) The form given in the statute is sufficient, but not essential, so the requisites stated in the fifth and seventh sections are contained in the certificate. The words "described in, and who executed" are not essential. (2 Cow. 567.) The seventh section does not require them to be inserted. The certificate in this case sufficiently states the identity of the party. The fact of acknowledgment is also sufficiently stated. It is true that it does not state that the party acknowledged that he executed the instrument "freely and voluntarily," but this is not essential, and the voluntarily execution of the instrument must be presumed, from the fact that he acknowledged that he "executed the same."

The instrument, then, being properly acknowledged and recorded, was notice to all parties concerned. And whether a mortgage or not, it gave the defendant, Grewell, the right of re-entry upon the failure of Samuel M. Henderson to pay the notes. The plaintiff having entered under Samuel M. Henderson, and in subordination to his title, cannot question his right to execute the instrument. If Grewell had the right to re-enter upon the possession of Samuel M. Henderson, he had equally the right to re-enter upon the possession of the plaintiff. The party who has the title, and the present right of possession, can always peaceably enter into possession of the premises, and cannot be held liable for so doing, on trespass or ejectment. If he uses force, he will be liable to the remedy of forcible entry and detainer.

In the case of *Grewell v. Henderson*, (7 Cal. 270,) we expressed the opinion that the instrument was not a mortgage. It was not necessary then to decide that point, as the decision rested upon another ground. Neither is it necessary, in this case, to decide whether the instrument was a mortgage or not.

The Court did not err in granting a new trial, and the judgment is affirmed.

[585] *THE CALIFORNIA STEAM NAVIGATION COMPANY v. WRIGHT.*

PLEADING—WANT OF CAPACITY TO BE SPECIALLY PLEADED.—The want of capacity in plaintiff to sue should be specifically set up in the answer. The general issue is not sufficient.

COVENANT, WHEN BINDING.—Where the defendant being the owner, in whole or in part, of certain steamers, in consideration of a sum of money paid to him, covenanted that he would not run, or suffer to be run, or employed, those steamers on certain waters of the State: *Held*, that he was not released from his covenant by a sale of the steamers, or of his interest therein.

IDEM.—A voluntary promise by the holder of defendant's agreement, that he would not assign it, was not binding; and where the contract was in fact made for the benefit of a company in which the obligee held stock, with knowledge of that fact on the part of the defendant, such promise was in fraud of the company's rights, and the defendant could not avail himself of it.

IDEM.—Nor if the fact is that defendant was kept in ignorance by the obligee of the contract, that he was acting for the company, can the defendant avail himself of the fact as a defense, no fraud being alleged, while he retains the consideration paid for his contract. He cannot retain the consideration on the ground of fraud, and resist the payment of the penalty of an infraction of his contract on the same ground.

APPEAL from the District Court of the Twelfth Judicial District.

This was an action upon a contract made by the defendant, being the owner of or interested in certain steamboats, with Richard Chenery, also the owner of steamboats, whereby the defendant, in consideration of fifteen thousand dollars to be paid by Chenery, covenanted that he would not "run, or suffer to be run, or employed, the steamer West Point, or other steamer" in which he was interested, to navigate certain waters of this State at any time within three years from the date of his contract, which was made February 21, 1854, and that if he failed to comply with his contract, he would pay to Chenery, or his assigns, the sum of fifteen thousand dollars. The contract was, on March 1, 1854, assigned by Chenery to the plaintiff, then and now a corporation, organized under the laws of this State. The contract was assigned to plaintiff in the fall of 1855. The complaint alleges a breach of the contract by defendant, and prays for judgment for fifteen thousand dollars.

The defendant demurred to the complaint, and the demurrer being sustained by the Court below, and judgment entered for defendant, the plaintiff appealed to this Court, when the judgment of the Court below was reversed, and the cause remanded. (6 Cal. 258.)

The defendant then answered in the Court below, and the plaintiff recovered a judgment for fifteen thousand dollars, from which defendant appealed.

It was shown by the defendant on the trial that he had parted with his interest in the vessels concerning which he con-

*See same case, 6 Cal. 258.

tracted, *before the alleged breach of contract occurred. [586] It was proved that at the date of the contract the defendant was interested in the steamer *Goliah*, and that she did actually run upon the streams specified in the contract, and from which she was thereby to be excluded, within three years from the date of the contract. It was also shown that Chenery had ceased to be interested in steamboats before the alleged breach, and had assigned the agreement after defendant had parted with his in the *Goliah*. The defendant sold his interest in August, 1854; Chenery ceased to be interested in steamboats in April, 1855. The assignment of the agreement to plaintiffs was made in August, September, or October, 1855; written notice of the assignment was given to defendant, by the plaintiff, October 9, 1855. The *Goliah* was put upon the Sacramento River (one of the streams prohibited to her by the contract), October 5, 1855, and taken off in the middle of November, 1855. On September 19, 1855, Chenery wrote a letter to the defendant, in which he asked as a favor, that if defendant sold his vessel (the *Goliah*), he should be informed of it before the sale, in order that his (Chenery's) creditors might sell his stock, which was pledged to them, to better advantage. It was proved, however, that the defendant knew before he sold his interest in the *Goliah* that the contract was made by Chenery, for the benefit of the company, the plaintiff herein, then about to be formed, and that the plaintiff paid the fifteen thousand dollars, and twenty-five hundred dollars additional, agreed to be paid, if the West Point was sent to sea.

Crockett and Page, for Appellant.

1. The Court erred in admitting in evidence the plaintiff's charter or act of incorporation; and we maintain, a steamship or steamboat company cannot be incorporated under the Act of 1853, but must conform to the Act of 1850, which this charter does not profess to do.

2. We submit that upon a fair and reasonable interpretation of the contract, when Wright ceased to have any interest in, or control over the *Goliah*, he was not responsible for her future employment; and it was no breach of Wright's covenant for Brown, who then owned her, to employ her in the Sacramento trade. We think the obvious meaning of Wright's undertaking was that no boat in which he was then, or might thereafter become interested, or over which he exercised control, should, whilst he was interested in, or exercised control over it, engage in the prohibited navigation, during the time specified. The object of the contract was to avoid a competition with the boats owned or controlled by Wright, whilst so owned or controlled by him, and not to make him responsible for the employment *of boats in which he had no interest, and over [587] which he had no control.

A different construction of the contract would have had the effect, practically, to prevent Wright from selling any interest

he owned in steamboats, during the three years; and this would be against public policy, as tending to prevent the alienation of property, and operating as a restraint upon trade. These considerations are entitled to great weight in respect to steamboats, which are now the great vehicles of commerce; and the untrammelled transmission of which, from hand to hand, is indispensable to the necessities of trade. If, therefore, the effect of the contract was to restrain Wright in the sale of his interest, it was void as against public policy. (Story on Cont. Sec. 546.)

3. The proof shows, that before the alleged breach of the contract occurred, Chenery had wholly ceased to be interested in steamboats, which fact was known to Wright, who was ignorant, however, that the contract had been assigned to the plaintiff; and it was not in fact, assigned, until about the time of the alleged breach; no notice of the assignment having been given to Wright, until the 9th of October, 1855, which was four days after Brown had commenced running the Goliath in the Sacramento trade. On the 19th of September, Chenery, whom Wright believed to be still the holder of the contract, addressed a letter to Wright, evincing clearly his knowledge that the boat was about to be sold to Brown, and in that event, would be placed in the Sacramento trade. He does not remonstrate against it; but, on the contrary, evidently concedes the right of the new owner to employ her as he pleases, without any liability upon Wright; but foreseeing that such employment of the boat might impair the value of the stock of the company, he asks, as a favor, to be notified in advance of the sale, so that his stock, held by his creditors, may be sold out before the sale of the boat. He manifestly interprets the contract as permitting Wright to sell, without being responsible for the future employment of the boat; and it is a well established rule, that when the parties interpret their own contracts, the Courts will give them the same interpretation. So far as Wright was concerned, he had a right to treat Chenery as the owner of the contract, being then ignorant of the assignment; and when Chenery concedes, as he evidently does in his letter, the right of the purchaser to employ the boat as he pleases, without any liability upon Wright, the latter was fully justified in acting on that construction of the contract.

4. Chenery, at the date of the alleged breach, having ceased to be interested in navigation, as was well known to Wright, and the latter having no knowledge of the assignment, had the right to treat his obligation as at an end, and Chenery's letter manifestly induced the belief that he should make no op-
[588] position *to the contemplated employment of the boat in the Sacramento trade.

5. The plaintiff was not competent in law to take an assignment of the contract, and enforce the same, even though its act of incorporation was conceded to be valid. The company was incorporated to navigate the waters of this State with steam vessels, for the transportation of freights and passengers; and

though it would be authorized to do any act, fairly and legitimately within the scope of its charter, or necessary to the complete enjoyment of the franchise, we maintain that this does not include a power to enter into contracts, or take an assignment of contracts made with other parties, binding such other parties not to engage in navigation.

What powers may be exercised by corporations, as incidental to the purposes of their creation, is fully set forth in Angell and Ames on Corp., secs. 256 to 276. But we invite the especial attention of the Court to the following cases: *State v. Com'rs, etc.*, 3 Zab'r., 510; *Abbott v. Balt. and Rapp. St. Packet Co.*, 1 Md. Ch. Dec. 542; *Pennsylvania Co. v. Dandridge*, 8 Gill & J. 248; *Coleman v. Eastern County Railway*, 10 Beav. 1.

6. The concealment by Chenery from Wright, of the fact that the company was about to be organized, and that the contract was really for its benefit, was a fraud upon Wright, which vitiated the contract. The profits to be derived from running his boats depended upon the extent of the competition. With an opposition conducted by Chenery, Minturn and others, he might, and probably did anticipate small profits, and was therefore willing to retire from the trade for a small price; but with the boats of these several persons concentrated into the hands of a corporation, he might, for aught that appears, have considered his boats more valuable, and his chances for large profits better.

Janes, Lake & Boyd, for Respondent.

Most of the objections raised by the appellant to this judgment, were passed upon by this Court, when this case was here upon demurrer to the complaint.

The main ground of error now insisted on by the appellant is, that the plaintiff is not a corporation; or, in other words, has not legal capacity to sue.

We submit that this objection comes too late. It should have been specially set up in the answer.

It is not necessary to consider whether, at common law, a plea of the general issue put in issue the existence of the corporation.

The decisions on that point are conflicting.

In Massachusetts, New Hampshire, Maryland, Kentucky and Ohio, it is held that such defense must be specially pleaded (see *1 Mass. 159; 6 N. H. 527; *Id.* 197; 5 Har. [589] & J. 489; 7 Mon. 584); while in New York it was held that the general issue put the plaintiff to the proof of its corporate existence. The inconvenience of such rule induced the Legislature to interpose, and there is now a statute of that State which provides that such defense must be specially pleaded.

Under our Practice Act, we insist such defense should be specially set up by answer.

Section forty provides for cases in which the defendant may

demur to the complaint, and among the causes of demurrer "that the plaintiff has not the legal capacity to sue."

Section forty-four enacts that "when any of the matters enumerated in section forty, do not appear on the face of the complaint, the objection may be taken by answer."

Section forty-five provides that "if no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same," excepting only the objection to the jurisdiction of the Court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

The second point made by the appellant, requires only to be re-stated in a condensed form, to show its unsoundness.

The proposition is, that Wright, after receiving seventeen thousand five hundred dollars, in consideration of which sum he covenants "that he will not run, or suffer to be run or employed," the steamer Goliah, for a given period of time, might the next day sell the steamer, and the purchaser would be at liberty to navigate her where he pleased, and it would be no breach of the contract on the part of Wright.

Such was neither the letter nor the spirit of the contract. The covenant on the part of Wright was that his steamboats should not run within the stipulated limits, for which covenant he was paid a large sum of money. Nothing could release him from a faithful performance of the covenant short of an express license. No license was pleaded or attempted to be proved.

On the contrary, the evidence shows that Wright knew, shortly after entering into the contract, that it was, in fact, made in contemplation of the formation of the Navigation Company, and for its benefit, and so knowing, he from time to time received the whole consideration for the covenant on his part, seventeen thousand five hundred dollars, from the Company.

BURNETT, J., delivered the opinion of the Court—TERREY, C. J., and FIELD, J., concurring.

This was an action to recover a specified sum as stipulated damages.

The case was before this Court in July, one thousand [590] eight *hundred and fifty-six, *when the judgment of the Court below sustaining the demurrer to the complaint was reversed, and the cause remanded for further proceedings. The defendant answered, and the plaintiff had judgment, from which the defendant appealed.

The first point made by the learned counsel of appellant is that the Court erred in admitting in evidence the plaintiff's charter. They insist that a steamboat company cannot be incorporated under the Act of 1853.

But we are not permitted to examine this question, as the answer did not properly put it in issue. The answer was a simple denial of the allegations of the complaint in general terms,

except as to one point. Under the provisions of the fortieth, forty-fourth and forty-fifth sections of the Practice Act, the want of capacity in the plaintiff to sue, should have been specially set up in the answer. The general issue is not sufficient. (1 Mass. 1, 159; 6 N. H. 527, 197; 7 B. Mon. 481.)

The want of legal capacity to sue is a personal disability; and if the defendant intends to set up such a defense, he should state so distinctly. The general denial relates to the other facts alleged concerning the contract. The defense, that the plaintiff has not legal capacity to sue, goes to the entire action, constituting a full separate defense, and should be separately stated.

The second point made by the defendant is "that upon a fair and reasonable interpretation of the contract, when Wright ceased to have any interest in, or control over the Goliah, he was not responsible for her future employment."

In the agreement, the defendant, Wright, stipulated that he would not run, or suffer to be run, or employed, the said steamer West Point, or any other steamer in which he is now or may hereafter be interested."

It appears, from the testimony, that defendant, at the time he made the covenant, owned one third of the Goliah, but that he had parted with his interest to his two sons, before the steamer was put upon the Sacramento river. And his counsel insist that under the agreement, properly construed, "it was a present, subsisting interest, or control, at the date of the alleged breach of the covenant, which was to determine his liability; and not an interest held before or after the act complained of."

It is true that the interpretation making defendant liable after he had parted with his interest in the Goliah, would prevent him from selling his interest in the vessel, except at his peril. He could, however, have protected himself by binding the purchaser not to employ her in the prohibited trade. But, on the other hand, if we adopt the interpretation of defendant's counsel, the plaintiff's assignor made a very foolish arrangement, for if Wright could sell the vessels in which he was then interested, and thereby absolve himself from all responsibility, then *the substantial purposes of the agreement would have [591] been defeated.

The language of the agreement is too specific, definite, and certain, to be mistaken. The object of the covenant was to exclude from the trade certain vessels then belonging to defendant, in whole or in part, and also all others that might thereafter belong to him at any time within the stipulated period of three years. And this construction is supported by the stipulation that the vessels themselves were pledged to secure the due performance of the contract on his part.

The third point made by defendant's counsel is, that at the time of the alleged breach, Chenery, the assignor of plaintiff, had ceased to be interested in steamboats, and the assignment of the agreement was made after defendant had sold his interest in the vessel. It appears defendant sold his interest August,

1854; Chenery ceased to have any interest in steamboats in April, 1855; the assignment of the agreement was made in August, September, or October, 1855; written notice of the assignment was given to defendant by the plaintiff October 9, 1855; the Goliah was put on the Sacramento river, October 5, 1855, and taken off on the middle of November, 1855. On the 19th of September, 1855, Chenery wrote a letter to defendant, in which he asked defendant, as a particular favor, in case he sold his vessel, to inform him before the sale, that Chenery's creditors might sell his stock (which was pledged to them as collateral security) to better advantage. It is insisted that these facts show that Chenery, who then held the agreement, considered Wright authorized to sell, and that he would not be responsible if his vendors should put the vessel into the prohibited trade; and that defendant was misled by the acts of Chenery, and induced to take the course he did by the latter's implied consent. But the proof shows that defendant had sold all his interest in August, 1854, and that the agreement was in fact made by Chenery for the benefit of the company then about to be incorporated; that the seventeen thousand five hundred dollars agreed to be paid by Chenery was paid by the company in checks drawn by its officers upon its bankers, and that defendant knew these facts before he sold his interest in the vessel. It is true that Chenery, in September, 1855, told defendant he had not assigned, and would not assign the contract to any one.

There can be no doubt but that the company would be responsible for everything that Chenery was permitted to do in his own name before the assignment, provided the defendant was ignorant of the fact that the contract was made for the benefit of the company. (*Osborn v. Hendrickson*, 7 Cal. 282.)

The promise of Chenery, that he would not assign the contract to any one, was made without consideration, and did not bind him, and was in fraud of the company. The defendant had *no right to receive and act upon such a promise, when he knew the facts.

The next point raised by the defendant is that the plaintiff was not competent in law to take an assignment of the contract, and enforce the same, even though its act of incorporation was conceded to be valid. The company being chartered for the purposes of navigation, it is insisted that such an act did not come within the scope of its charter. There is certainly a great deal of force in this objection, but as it was necessarily decided by this Court on the former appeal, the question must be considered as put at rest in this case, and we are not at liberty to express any opinion in regard to it.

The last point necessary to notice is, that the agreement was void, because Chenery concealed from defendant the fact that he was acting for the company then about to be organized.

If we concede, for the sake of argument, that Chenery was guilty of such fraud as would void the contract, and that the company was bound by his acts, could the defendant avail him-

self of such defense under the answer in this case? We think not. No fraud was alleged in the answer. Nor could the defendant avail himself of such a ground, and still retain the seventeen thousand five hundred dollars received by him. He should have proceeded promptly to set aside the agreement by a direct suit for that purpose, when he discovered the fraud, and by offering to return what he had received. The parties must be placed in *statu quo*. To say that Wright could keep all the money, upon the ground of fraud, and then resist the payment of the penalty upon the same ground, would be clearly unjust and illogical. If the agreement was valid for the purpose of the payment, it must be valid for the penalty. It must be good or void for both purposes.

Judgment affirmed.

McDEVITT v. SULLIVAN.

LANDLORD, TITLE OF, WHEN MAY BE DENIED BY TENANT.—A tenant may show that his landlord's title has terminated, or that his attornment was made under mistake of fact, or by fraud.

FORECLOSURE SALE—RIGHTS OF PURCHASER.—Where the owner of mortgaged premises leases the same for a term of years, and the rent is paid in advance by the tenant: *Held*, that the purchaser, under the mortgage-sale can require the tenant to pay the rent over again to him.

1 IDEM.—RIGHT TO RENTS.—After sale, and before the term of redemption has expired, the purchaser is entitled to collect the rents.

IDEM.—DUTY OF TENANT.—Where a tenant finds that there are adverse claimants to the property, he should file a bill of interpleader, making all the adverse claimants parties thereto, and offer to pay the rents into Court, to abide the ultimate decision of the case.

APPEAL from the District Court of the Fourth Judicial District.

In November, 1847, Charles Dorente died, seized in fee of lot *No. 196, in the city of San Francisco, leaving a [593] widow and two infant heirs, Albert Dorente and Augustus Dorente. In June, 1849, the widow intermarried with J. Hawes Davis; and in August, 1853, Davis and wife mortgaged an undivided interest of the lot to A. A. Cohen. On the 1st of December, 1854, Davis, in his own name, leased a portion of the lot to the defendant for the term of six years. The mortgage was foreclosed, and the lot sold by the sheriff, and purchased by Abel Guy, on the 21st of June, 1855. The suit to foreclose the mortgage was commenced April 20, 1855. On the 17th of March, 1855, McDevitt brought a suit against Davis for grading the lot, and recovered judgment, under which the interest of Davis in the premises, held by defendant, was sold by the sheriff and purchased by defendant on the 16th of July, 1855. On the 9th of August, 1855, the defendant assigned the sheriff's certifi-

1. Cited *Knight v. Truett*, 18 Cal. 115; *Wells v. Walker*, 37 Cal. 431.

cate of sale to the plaintiff. In the assignment, which was indorsed upon the certificate of sale, the defendant "agreed to hold the premises of McDevitt, subject to the same terms and conditions upon which the defendant previously held them, under the lease from Davis during the unexpired term."

On the 29th of August, 1855, the two heirs of Dorente instituted a suit in partition for a division of the lot, in which Davis and wife and Abel Guy were made parties. In December, 1855, the District Court made a decree of partition, under which the premises occupied by defendant, Sullivan, were set apart to Albert Dorente. Albert Dorente, by his guardian, brought suit in the District Court against Sullivan, in 1856, for the rent of the premises accruing after the month of January, 1856, and obtained judgment against Sullivan by default. Sullivan applied to the Court to set aside the default, which was denied, and Sullivan appealed to this Court, where the judgment was affirmed. After the assignment of the certificate of sale by Sullivan to McDevitt, the former paid several months' rent to the latter. It appears that McDevitt paid Sullivan nothing for the assignment, but credited the judgment against Davis with the amount bid by Sullivan. Sullivan having refused to pay any more rent to McDevitt, this suit was brought to recover thirteen months' rent, from January 1, 1856, to February 1, 1857, inclusive. Upon the trial in the Court below, the defendant had judgment, and the plaintiff appealed.

E. Bartlett, for Appellant.

It matters not what title the appellant may have, so long as the respondent, pursuant to his lease, held and enjoyed the premises from the appellant; and neither can it be shown, either before or after the lease, that the appellant's title was not good, for in no case can he be permitted to attack the title of his landlord. All the tenant can be allowed to show is, that the [594] *landlord has parted with his interest, since the making of the lease; not that it was not good, but that the landlord's interest has determined, either by his own act, or by some act of law to which he is a party, and this lease to the consideration of another portion of the evidence, embraced within the first exception, and that is the record of the partition-suit. It will be seen, from the statement, that the partition-suit was commenced twenty days after the respondent became the tenant of the appellant—that is, the 29th of August, 1855; consequently, he can only be bound by it by being made a party in the suit, and which it is admitted he was not. The record, therefore, could not be evidence to affect the appellant's title. (1 Henry & M. Va. R., 345; 1 Breck. 23; 9 Pet. 8; 4 Wheat. 213; 4 Cond. R. 426; 2 Gall. 565.) At the time of bringing of the partition-suit, Davis had at most only an equity of redemption in the premises, and out of possession, and the decree could only affect that interest; so that to whatever person it may have been transferred, he could take no greater interest than Davis himself had. If, therefore,

the equity of redemption passed to Albert Dorente, by virtue of the decree in partition, then, to show a determination of the appellant's estate, it was necessary for the respondent to show that Dorente had redeemed, which it is not claimed.

It is not law to require that the appellant should show that the party holding Davis' equity of redemption has not redeemed by producing the sheriff's deed. This is not only requiring the appellant to establish a negative, but it is also in violation of the principle, in effect, for which we have been contending; that is, that the tenant cannot dispute his landlord's title, because if this, as a proposition of law, is true, it must be equally true that the landlord, in an action for rent, cannot show his title. The burden of proof was upon the respondent to show the determination of the landlord's estate, by showing that Dorente had redeemed.

The counsel for the respondent will endeavor, upon the argument, to make a point upon what he considers as a mistake of fact existing between the parties at the time of making the lease of the 9th of August, which renders it void. What is claimed as constituting this mistake of fact, is this: That at the time of the sale on execution, on the 16th of July, and the sale and lease on the 9th of August, both took place under the supposition, by the parties, that Davis was the owner of the premises, and that they did not know of the sale or foreclosure on the 16th of June. It will be seen that this question cannot be gone into without necessarily bringing up the question of title, as the decree of foreclosure necessarily affects the title, and therefore comes within the first exception. But even if it could, it would not show what amounts to a mutual mistake of facts, *for if this sale took place under foreclosure, Davis still [595] had his equity of redemption, and the possession.

This sale was a matter of public record, and both had the means of knowing it if it was so. (*Potter v. Everett*, 2 Hall, N. Y. 252; 9 Cow. 674; 1 Wend. 355; 3 Wend. 412.)

C. M. Brosnan, for Respondent.

The defendant insists:

1. That it is competent for him to show that Davis had no interest in the land; and, of course, that McDevitt acquired no interest under the judgment and sale of Davis' interest: and hence, that there was no consideration for the agreement of Sullivan to pay rent to McDevitt.

2. Sullivan having acquired possession in 1854, under his lease, and that possession continuing to the present, he is at liberty to dispute the claim of McDevitt, not having first acquired possession through him.

3. The attornment to McDevitt was void, and without consideration, as nothing passed under the sale; and was made under a mutual mistake.

4. The Court below should have given judgment for the defendant Sullivan, for the money which he paid to McDevitt un-

der that mistake and void agreement. Dorente, the owner of the land, is alone entitled to the rent, and he has already recovered judgment for it, which Sullivan has paid.

The following cases are directly in point to show that the defendant is not estopped, and that rent cannot be recovered upon a void lease, or where the party has no interest: 8 B. & C. 471; 15 Eng. C. L. 234; Chitty on Contracts, 295, 296; 6 Taunt. 202; 11 Vt. 323, and note; 1 Bing. 38; 6 Tenn. 682.

And these show that he is entitled to judgment for the money paid by him to McDevitt: 3 Den. 130; 20 Wend. 174, mutual mistake; 10 B. & C. 234; 21 Eng. C. L. 106; 9 Mass. 408; 1 Brod. & B. 289.

BURNETT, J., delivered the opinion of the Court—FIELD, J., concurring.

1. The premises being mortgaged at the date of the lease from Davis to Sullivan, in December, 1854, Sullivan took the lease, subject to the mortgage. When the mortgage was foreclosed, and the premises sold to Abel Guy, the mortgaged estate of Davis and wife passed to Guy. From the time that the estate vested in Guy, he acquired the right to demand of Sullivan, either the possession of the estate purchased under the mortgage-sale, or a proportionate part of the rent. In a suit by McDevitt against Sullivan, the latter had the right to show that a part of the interest of Davis had passed, and that his estate thus far had ceased. So far as McDevitt claimed as the [596] successor *of Davis, he was only entitled to the rents that Davis would have claimed at the time of the purchase and assignment by Sullivan. Previous to that purchase, the interest mortgaged by Davis and wife had passed to Guy, leaving in Davis only that portion not covered by the mortgage. Although, as a general rule, a tenant cannot dispute his landlord's title, he may show that it has terminated. (Chitty on Contracts, p. 296-7.)

2. But it is insisted, by the learned counsel for the plaintiff, that Sullivan entered into a lease of the premises with McDevitt, and paid him rent; and that Sullivan is, therefore, estopped from denying his landlord's title. This ground does not seem to be tenable under the peculiar circumstances of this case. Sullivan did not obtain possession under McDevitt, and he is not estopped from showing that the attornment to McDevitt was made under a mistake of fact. The lease made by Sullivan with McDevitt, and the payment of rent, constitute only *prima facie* evidence of title in McDevitt. The proof being only *prima facie*, was fully overcome by the facts established in evidence. There can be no doubt of the fact that Sullivan purchased the premises for the benefit of McDevitt, and the assignment of the certificate of the sheriff was simply to carry out the understanding between them. It was, therefore, a mistake on the part of Sullivan in agreeing to pay to McDevitt the entire rent, including the portion that rightfully belonged to Abel Guy. (Chitty on

Contracts, 296-8; 15 E. C. L. 234; Taunt. 201; 11 Vt. 323; 1 Bing. 391.)

So far, then, as to the individual interest covered by the mortgage, Sullivan had the right to show that he owed the rent to another, and not to McDevitt.

3. But as to that portion of the interest not covered by the mortgage, the case presents a very different question. It is true, that under the authorities before cited, the execution of the assignment, and the payment of the rent would not estop Sullivan from disputing the title of McDevitt. But how far will this right permit Sullivan to go? Under this privilege, can he show, contrary to his lease to Davis, that Davis never had any title? And if he could not be permitted to show this, as against Davis, (had Davis, instead of McDevitt, brought this suit before the partition), could he be permitted to show it as against McDevitt, the regular successor in interest of Davis? McDevitt claims the rent, not only in virtue of the lease, but in virtue of the purchase. He claims upon two distinct grounds. By taking the lease from Davis, and entering into possession under him, Sullivan is not permitted to deny the original title of Davis, unless he had set up and shown fraud in obtaining the lease, or that the premises had been decided, by a competent Court, to belong to another, in a suit in which his landlord had been made a party before his interest passed to McDevitt, or that McDevitt, after his interest *accrued, had been a party [597] to such suit. The proceedings in the partition-suit did not affect McDevitt, as he was no party to them, and he had succeeded to the interest of Davis in the lease before Davis was made a party. It is true, the right to redeem remained in Davis at the date of the judgment in the partition-suit. But if any redemption was in fact made, the party claiming the benefit of the redemption should have proven that fact. Before the time for redemption expired, the purchaser was entitled to collect the rents. (*Reynolds v. Lathrop*, January Term, 1857.) And after the time expired, he would have the same right. The certificate of the sheriff did not convey the legal title of Davis to McDevitt, but it was equivalent to an assignment of the lease. The certificate, under the provisions of our statute, was an executory agreement to convey the title to the land after the expiration of the time limited for redemption, and in default of such redemption, while it was a present assignment of the lease itself. As to the proceedings in the suit of Albert Dorente against Sullivan, for the rent, they cannot affect McDevitt, because he was not made a party, and because the judgment was by default, and not upon the merits. Because Sullivan permitted Albert Dorente to take judgment against him by default, it was no reason that such a judgment should bind any one but the parties to it.

But even conceding such judgment had been upon the merits, it could not bind McDevitt, who was no party to the suit. The moment Sullivan discovered that there were adverse claims to

the rents, he should have filed his bill of interpleader, making all adverse claimants parties, and offering to pay the rents into Court, to abide the ultimate decision as to the party entitled to them. When a party rents property of another, and he learns afterwards that the title of his landlord is disputed, he may at once proceed in the proper mode to settle the question. If he fail to do this, he cannot dispute the title, except in the cases stated, where the title of his landlord has ceased, or when the lease was obtained by fraud. As Sullivan did not obtain possession under McDevitt, he might well show any fact that would prove that the right of Davis in the lease, in whole or in part, did not pass to McDevitt; but he could not dispute the original title of Davis, or his original right to make the lease in his own name, except in the cases stated. Conceding the right of Davis as against Sullivan, and conceding that it passed to McDevitt, the proceedings in the last two suits mentioned can have no effect upon McDevitt's rights, and they stand as if those suits had never been brought.

There was, then, before the Court, no competent testimony to show that Davis had no title as against the tenant at the time of the purchase and assignment by Sullivan, except as to that portion of Davis' interest covered by the mortgage. It may [598] be *unfortunate for Sullivan to be forced to pay the rents twice, but we can only decide upon the facts parties bring up before us.

Our conclusion is, that McDevitt is entitled to judgment for that portion of the rents that did not pass to Abel Guy; and that Sullivan is entitled to a credit for the over-payments made to McDevitt before the suit was brought. Guy being entitled to a certain portion of the rent from the date of his purchase, McDevitt had no right to receive the entire rent, including the portion due to Guy. And for that excess in the payment, Sullivan has a right to a credit. (10 B. & C. 106.)

The judgment of the Court below is reversed, the cause remanded, and that Court will render judgment for the plaintiff, in accordance with this opinion.

JENKINS v. REDDING.

MINING CLAIM.—TITLE OF PURCHASER.—Where the owner of a mining claim contracts, verbally, with J., for the working thereof, and agrees to pay him a certain sum out of the proceeds of the mine, and J. goes into possession thereof, and while he is working it the owner sells it to a third party, who takes without notice of J.'s contract: *Held*, that his claim is not subject or liable to J.'s contract.

IDEM.—POSSESSION BY EMPLOYEE.—The possession of J. being that of his employer, was not notice to the purchaser.

APPEAL from the District Court of the Fourteenth Judicial District, County of Sierra.

This was a suit in equity, for the purpose of enforcing a lien

which the plaintiff claimed on the one twenty-fourth interest of the defendant in the Oregon Mining Company. The facts are as follows:

Ames and Buss, then owing one twelfth interest in said company, made a verbal agreement with plaintiff Jenkins, to work their interest in said company, for which Jenkins was to have five dollars per day, to be paid him as it was taken from the claims.

Plaintiff went to work under this contract, and labored for a long period, sometimes representing his employers' interest at the meetings of the company, and drawing a part of the dividends, which were much less than five dollars per day.

While plaintiff was at work, Buss, owning one twenty-fourth interest, sold it, and the defendant became invested with the interest of Buss, without notice of plaintiff's contract. The Court below decided that plaintiff's possession was notice to defendant, and rendered a decree in favor of plaintiff. Defendant moved for a re-hearing, which being denied, he appealed.

Vanclief & Stewart, and J. R. McConnell, for Appellant.

*Cited: Coke on Litt. 4a, 4b; Compiled Laws, p. 200, [599] Sec. 6; Id. p. 202, Sec. 25; *Merced M. Co. v. Fremont*, decided April T., 1857; *Caswell v. Distich*, 15 Wend. 379; *Bradish v. Schenck*, 8 John. 151; *Foote v. Colvin*, 3 Id. 215; *Whipple v. Foote*, 2 Id. 418; *De Mott v. Hagerman*, 8 Cow. 220; *Martin v. Wilson*, 1 Den. 602; *Heywood v. Miller*, 3 Hill, 90; *Bird v. Dennison*, April T., 1857; 1 Story's Equity Jur., secs. 63c, 630 and notes, 108, 165, 381, 409-411, 416, 434, 436; 2 Story's Equity, secs. 1502-1505, 1510, and authorities in the notes; *Payne v. Campton*, 2 Younge & C. 457-464.

The point decided by the Court is simply this:

By virtue of the parol, or rather, verbal executory contract, between Ames and Buss, of the one part, and Jenkins of the other, by which Jenkins was to work the share of Ames and Buss, at the rate of \$5 per day, to be paid as it came out from the claims, he (Jenkins) obtained a lien on the share itself. In other words, he thereby obtained an equitable interest in the mining claim or interest, for equity regards a lien as an interest in the property.

We propose to show: First, that by the Statute of Frauds and Perjuries, no lien or interest in the claim could be created by a mere parol agreement.

Secondly, that if such a claim could be so created, and was in fact so created, in this case, that the defendant Redding being a purchaser, without notice, the claim or share in his hands is exonerated therefrom.

Thirdly, that the contract in this case, as set forth in the bill, and as proved at the hearing, was a mere contract for the working of the claims; and did not, and could not, even if it had been under seal, have vested in Jenkins any interest in the claims, or lien thereon.

These several points likewise embrace the questions raised on demurrer, so that in arguing them, we argue the demurrer.

By the Statute of Frauds, the contract declared on was void, as against the defendant Redding.

Judge BARBOUR, in his somewhat elaborate opinion, assumes that the interest of Ames and Buss, in their mining ground, was, in contemplation of law, a less estate than a "leasehold interest of two years."

By what process of reasoning his Honor arrived at this conclusion, he has not seen proper to inform us.

Why he should have fixed upon a term of two years as the standard of comparison, we are at a loss to imagine.

But we deny his proposition *in toto*. If the miner has any interest at all in his claims, it is an estate of greater legal value than any term of years, whether above or under two.

That he has an interest, we all know; for has he not the *jus disponendi*? Can it be sold to satisfy his debts? Will [600] it not *pass to his personal representatives, or rather to his heirs, after his death? How absurd, then, to say that his estate is less than a leasehold for two years.

We might here enter into a long legal disquisition as to the estate which the miner hath in his claim; and none will deny that the field is sufficiently ample. But it would be labor thrown away to do so in this case, where no necessity for it exists, and where it might, therefore, expose us to the charge of pedantry. Suffice it to say that, in our opinion, the miner under the permission of the government, has as ample, as perfect, and as appreciable an estate in his mining claim, as I have in my books, or I shall have in my homestead (if fortune ever bestows one on me).

It is true that we can perceive a distinction between a mining claim, as such, and the land of which it forms the most essential part, but it is, perhaps, too fine drawn and metaphysical for practical purposes.

But the learned Judge seems not to have noticed the peculiar language of the sixth section of the Act concerning fraudulent conveyances (Com. Laws, 200), which provides that "no estate or interest in lands, other than leases for a term not exceeding one year; nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, except by deed or conveyance in writing." (Com. Laws, 200.)

The Court will see that the disjunctive is here used, and "trust and power" are put in opposition to "estate and interest," so that it is very clear that the exception of "leases for one year," applies to "estate and interest," and not to trusts or powers. This is manifestly the true construction, although there may be some confusion in the language used.

Now, the interest of Jenkins, from his own showing, cannot amount to more than a mere trust, though we think it does not even amount to that. It is not an estate or interest (which words we suppose refer to the legal title) in lands, within the

meaning of this statute; but, at most, a charge on the estate of the owner of the legal title, and should therefore, if our views of the statute are correct, be created by a written conveyance. (Com. Laws, Sec. 25, p. 202.)

Moreover, we apprehend that the question of the nature of the miner's estate in his claim scarcely cuts any figure in this case. For, whether it is a chattel-interest or partakes of the nature of the realty, it seems to us that a trust cannot be created over it by parol, as against the defendant Redding. As between Ames and Jenkins, a parol trust might perhaps exist; but, as against the defendant Redding, who occupies the position of "an innocent purchaser for a valuable consideration," a parol trust even over a chattel would not avail. So much for the first point.

We think we have demonstrated that Jenkins had no legal interest or estate in the claims. We shall now [601] prove, if it be necessary, that he had no lien or equitable interest, such as a Court of Equity will enforce. The mere statement of the proposition is sufficient to refute it.

That a privilege to work on property should be regarded as an interest in the property, seems to us the very acme of absurdity. The right to dig, to grub, to roll heavy rocks, and shovel huge masses of earthy matter, considered in the light of a beneficial interest in the soil! The proposition is at least as extraordinary as it is new.

Where, in the books of reports, or in the elementary treatises, will we find a parallel to this back-breaking, patience-destroying and constitution-consuming equity? Sysiphus might as well have pretended to a beneficial interest or trust in the soil of the hill upon which he was condemned eternally to roll an immense stone. Ixion might as well have pretended to have a trust, executed by the statute of 27 Henry VIII., (for conveying uses into possession,) in that old fashioned tread-wheel, around which the justice of the immortals had condemned him to travel, through illimitable eternity.

To descend to comparisons a shade more terrestrial, the milk-maid, or dairy-woman, who is engaged to attend the cows of the farmer, under a contract that she shall receive as the reward of her precious services, per week, the first pound of butter manufactured from each cow, might with equal, nay with greater propriety, claim to have a lien, a trust, or a beneficial interest, in the cows themselves. And, doubtless, were such a case to arise in practice, the learned Judge would so determine. A doctrine liable to consequences so absurd, must be absurd in itself.

Francis J. Dunn, for Respondent.

As a law proposition, the contract under which the respondent took possession, and held and worked the share in dispute, was a lien upon the same, until the conditions and stipulations of the same had been fully complied with and paid; it gave respondent no estate in the property, nor did it make him a lesser

as he was to pay no rents or yield tribute,—as lease or letting, defined, “is a conveyance of hereditaments, incorporeal or corporeal, to another, in consideration of certain rents or other recompense.” (2 Black. Com. 317; Shep.’ Touch. 266; Arch. L. and T. 2; 1 Hilliard on R. E. 212.)

Then, in order to create the lien, it was not necessary that the contract between respondent and Ames and Buss should have been in writing, in order to bind Ames and Buss, and all persons claiming subsequently under them or either of them.

The possession passing to and continuing in the respondent, at the time of the contract, respondent has no estate in the property, but only a lien on it, and possession for work [602] already *done, which might descend to his heirs, and for labor to be done which would not descend, even were the estate in the claims or share held by Buss and Ames, a corporeal hereditament, which I doubt. The right to work, by Jenkins, was not even an incorporeal hereditament. Our Statute of Frauds cannot and does not affect the contracts.

What was the estate of Ames and Buss in the share in dispute, when they contracted with the respondents to have the same worked?

It was an incorporeal hereditament, being a right issuing out of and exercisable within a corporeal hereditament or land. (2 Black. Com. 17–19; 2 Steph. Com. 120, 159; 2 Kent’s Com. 402.)

And the tenancy being upon the public lands of the United States, and only by permission, could, under the most latitudinal construction, be deemed a tenancy from year to year, acquired without writing, and transferrable in the same way, without conflicting with the Statute of Frauds.

But in truth, the tenure of Buss and Ames, and all holding the same right under them, is but that of tenants-at-will, as was fully settled in the case of *Duncan v. Potts* (5 Stew. & Por. 183), which case settles the point more fully than any other case I have been enabled to find, as the adjudications on this point are few—either that the Courts have evaded the point, or that it has not been presented for adjudication.

It was not necessary that the contract should have been in writing, and this Court fully sustains this view where possession followed. In the case of *Bird v. Dennison*, April T., 1857; *Stafford v. Little*, April T., 1857; *Johnson v. Ricketts*, July T., 1855; *Grover v. Hawley*, Oct. T., 1855; *Norris v. Russel*, July T., 1855; *Call v. Hastings*, 3 Cal. 179; *Hastings v. Benicia*, July T., 1855; *Benham v. Rowe*, 2 Cal. 387; *Rose v. Mooney*, 4 Id. 173; *Israel v. Ferguson*, April T., 1855; *Beech v. Covillaud*, 4 Cal. 173; *Solomon v. Hoffman*, 2 Cal. 138; *Tbhlér v. Folsom*, 1 Cal. 207.

In this case the appellant obtained possession of the share in dispute, as the trustee of all whom it might concern; and first for him or them, who had the first right of possession and claim to the issues and profits arising out of and from the share in dispute. That person was the respondent.

A trustee is defined to be “one to whom property is conveyed,

or by whom it is held, or required to be held, for the use of another." And with the proposition, appellant was and is the trustee of the respondent in this case, and as such can be compelled in equity to account and respond to his *cestui que trust*; indeed, he only holds for him, subject to the enjoyment and benefit respondent had in the trust-property under his contract. (2 Story Eq. Jur. 964, 965 and 966; 4 Kent's Com. 304.)

A trust is a confidence reposed in some other, which is not *issuing out of the land, but as a thing collateral to [603] the estate in the land; the *cestui que trust* having the right, in equity, to dispose of the land, or the profits arising therefrom.

(2 Story Eq. Jur. 960, 982; 4 Kent Com. 301, 313; 1 Stephen Com. 321, note d; *Brinkerhoff v. Lansing*, 4 John. Ch. 54; Coke on Litt. 143.)

TERRY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

The question in this case is, whether a lease for labor under a verbal contract can attach to a mining claim, so as to be enforced against such claim in the hands of an innocent purchaser, without notice.

We think the simple statement of such proposition its best refutation.

It is said that the plaintiff was in possession of the claim, and that his possession was a notice of his equities.

The answer to this is clear. He was employed to labor on the claim, and was in possession for that purpose only; he was a mere agent or servant, and his possession was the possession of his employer.

The judgment of the Court below is reversed, and plaintiff's bill dismissed.

HARR ET AL. v. BARKER ET AL.*

1 SALE AND DELIVERY OF PROPERTY IN WAREHOUSE.—Where the owner of a certain number of barrels of flour on storage in a warehouse sold them all to different purchasers, giving them orders on the warehouseman, which were given by the purchasers to the warehouseman, and new receipts given to them in their own names by the latter, and entries made on his books charging the vendor, and crediting the purchasers with their respective lots: *Held*, that there was a sufficient delivery of possession without a separation of the various lots.

2 IDEM.—SEGREGATION, WHEN NECESSARY.—Where a vendor only sells a part of goods on storage, if all together and of the same mark, must be separated from the larger mass in order to change the possession; but where all the goods of the vendor in the hands of a third party are sold, the change of possession is complete by delivery of the order, taking a new receipt, and entry of the transaction on the books of the warehouseman.

*Same case, 6 Cal. 489; post 609; 11 Cal. 393.

1. Cited *Ghirardelli v. McDermott*, 22 Cal. 641.

2. *McLaughlin v. Piatti*, 27 Cal. 463.

IDEM.—TITLE TO PROPERTY NOT SEGREGATED.—The different purchasers have a right to leave the goods so by them purchased in one mass, subject to an apportionment between themselves of any loss.

APPEAL from the District Court of the Twelfth Judicial District, city and county of San Francisco.

This was an action for the value of one thousand three hundred and forty barrels of Gallego flour, and three hundred and twenty-four barrels of Haxall flour, of the value of twenty thousand dollars, alleged in the complaint to be unlawfully detained by the defendants.

[604] *The only question in the case is as to the Gallego flour.

The record discloses the following facts:

On the 17th of October, 1854, J. R. West had, on store, at the warehouse of Tilden & Little, one thousand six hundred and eighty-two barrels of Gallego flour. West sold one thousand three hundred and twenty barrels to Horr & Dick; two hundred to McCreary & Co., and one hundred and sixty-two to Adams, Welch & Co., making, in all, the one thousand six hundred and eighty-two barrels. The sales were made by drawing orders upon Tilden & Little for the delivery of a specified number of barrels. The orders were accepted by the warehousemen, and West charged, and each purchaser credited upon the books with the number specified in each order. The flour was all of the same quality, and was all stored in the same bulk. There were no marks upon any of the barrels to designate the portion sold to each separate purchaser, and there was no separation actually made. While the property was in this condition it was converted by the defendants to their own use. Upon this state of facts, the Court below charged the jury "that in order that the plaintiffs should establish their title to the flour claimed in their complaint, if it were a portion of a large lot, all of the same kind and value, it was necessary that the particular lot to which they claimed title should have been segregated from the general mass, notwithstanding that orders calling for enough barrels to exhaust the residue may have been drawn by the original holder on the warehousemen.

The flour was proved to be worth twelve dollars per barrel. It was shown that the sheriff of the county had seized the flour under the direction of the defendants.

The jury, under the instructions of the Court below, found a verdict that plaintiffs were entitled to the possession of the Haxall flour, and that defendants were entitled to the possession of the Gallego flour.

Judgment was entered accordingly, and plaintiffs appealed.

Shafter, Park & Shafter, for Appellants.

The question presented by the charge of the Court, and the refusal to charge, is simply whether it is necessary for several vendees of individual portions of articles in bulk, all of the same

kinds, marks, and value—the vendee having sold, and in terms conveyed the whole of said bulk—to separate and distinguish the several portions, as between themselves, in order to protect their property against a mere stranger?

The answer to this question must be made consistent with justice, with the intention of the parties to the transaction, and with acknowledged principles of law.

That it was the intention of the parties, the one to part with, and the other to acquire the property in one thousand three hundred and twenty barrels of flour, cannot be [605] questioned, and this intention ought to be carried out, unless it is unlawful or impossible.

It is not unlawful, for the possession is changed as between vendor and vendee, according to all the authorities, by notice to the bailee, and still more when such bailee agrees to hold for the benefit of the vendee.

It is not only possible to carry out this intention, but to defeat it will entail a series of consequences in violation of well-settled principles.

This Court has held, in *Adams, Welch & Co. v. Gorham et al.*, 6 Cal. R. 68, where the above one hundred and sixty-two barrels were sued for, that these warehousemen are liable for this same conversion. It is true they were held liable, because they admitted by their receipt that the property was in their possession, but the gravamen of the action against them was the same as in the present case, a tortious conversion.

If we cannot recover against these defendants, it must be upon the ground that the property in the flour was not in us, and it must, of course, have remained in West. Could we maintain a suit against West? It should seem not. He fulfilled his contract in full when he gave the order for the flour, and he has never interfered with our right therein. No suit could be maintained by us against him then.

The character of the delivery necessary to vest in the vendee the property, is made to depend upon the intention of the parties; and the varying facts of the different cases are regarded as evidence, conclusive or otherwise, of such intention.

In this case, in view of the custom proved, and in view of the fact that the flour was of uniform appearance and value, there was a good delivery under the Statute of Frauds. (*Story's Contracts*, Sec. 792; *Hollingworth v. Napier*, 3 Caines, 185; *Wilkes v. Ferris*, 5 Johns. 333.)

And as against attaching-creditors of the vendor. (2 Vt., 555, *Spaulding v. Austin*.)

And this delivery was good to all intents as between the parties, if the Court believe that such was the intention of the parties, notwithstanding there was no actual separation. (*Riddle v. Varnum*, 20 Pick. 280; *Downer v. Thompson*, 6 Hill, 208.)

If the warehouse had been burned, the loss would have fallen on the plaintiffs. (*Pleasants v. Pendleton*, 6 Rand. 473, and cases cited therein; *Stanton v. Small*, 3 Sand. 230.)

Further, that in all the cases which may be cited against us, we believe there is this decisive difference: they present the case of a vendor retaining some interest in the "bulk" out of which the vendee is to receive a portion, while this case shows an entire extinguishment of the vendor's interest in the "bulk," and as to him terminates all questions of segregation.

[606] **Janes, Lake & Boyd*, for Respondents.

The question in this case is, whether this charge of the Judge was correct.

The principle is elementary and familiar, "that no sale is complete, so as to vest in the vendee an immediate right of property, so long as anything remains to be done between the buyer and seller, in relation to the goods.

"The goods sold must be separated and identified by marks or numbers so as to be completely distinguished from all other goods, or from the bulk or mass with which they happen to be mixed. If they be sold by weight, or measure, or number, the specific quantity bought must be weighed, or measured, or counted, so as to be separate and distinct from all other goods." (Story on Sales, Sec. 296, and cases cited in the note.)

This case comes directly within the above rule of law. West, having in the warehouse of Tilden & Little one thousand six hundred and eighty-two barrels of flour, in one lot, gives an order in favor of Horr & Dick for one thousand three hundred and twenty barrels, to be taken from the one thousand six hundred and eighty-two barrels, but is not taken, or separated, or counted, so as to be separate and distinct from the remaining three hundred and sixty-two barrels.

Until it was so separated, no title passed to the purchaser.

In other words, it was an executory contract to sell, and not a sale.

It was impossible for the plaintiffs to identify one thousand three hundred and twenty barrels out of the whole mass of one thousand six hundred and eighty-two barrels as their property, and equally so for McCreary & Co. or Adams, Welch & Co. to identify the number of barrels belonging to each, out of the remaining three hundred and sixty-two barrels, as their property.

Suppose one hundred barrels of the whole pile had been destroyed by rats or fire; whose flour would have been destroyed? It clearly would not be in the power of either or any of the purchasers to say his one hundred barrels were or were not the particular barrels destroyed.

It is like the case of *Rapelye v. McKee*, 6 Cow. 250, where a smaller quantity is sold out of a larger, without any designation.

The proposition on the part of the plaintiffs is, that no segregation was necessary in order to pass the property, because there were delivery-orders given to different persons sufficient to exhaust the entire lot of one thousand six hundred and eighty-two barrels. It is a sufficient answer to say that the plaintiffs must be able to identify their own flour. It is their lesser quantity

that must be separated from the larger quantity, no matter to whom that larger quantity may belong.

Besides, if their proposition is sound in regard to this lot of *flour, it must hold good in all cases, without regard to the character of the property or the quantity. So that where a merchant had made several contracts for the sale of his stock of goods sufficient in the aggregate to exhaust his entire stock, the title would pass, by the contract to each purchaser, of the quantity purchased by each. Or, take the case of a cargo of flour, where several contracts have been made to sell the entire cargo in lots of one hundred barrels to numerous persons, but no delivery or separation; under the rule contended for by the plaintiffs, each purchaser is vested with the title to the quantity of flour called for by his contract. [607]

The remarks of DURE, J., in *Suydam v. Jenkins* (4 Sand. 609), are directly in point in this case, where he says: "The five hundred barrels were themselves parcel of a larger quantity, and they had not been so selected and separated as to enable the plaintiffs to identify any portion of them as their property."

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

The only question in this case is, whether the charge of the Court below was correct. And the solution of this question will depend upon whether the title to the flour passed from West to the several purchasers.

The delivery by accepted orders upon the warehousemen, would have been clearly sufficient, had the property been segregated. (Story on Contracts, sec. 792; 5 John. 335; 3 Caines, 182.)

If the whole lot had been sold to the same person, the delivery would have been sufficient. What difference then will it make in principle when the whole lot is sold to different persons in different parcels? Suppose that West had drawn but one order, directing his warehouseman to deliver so many barrels to the first, so many to the second, and so many to the third party? Would the title then have passed?

It is laid down in general terms that no sale of goods is complete so long as anything remains to be done between the buyer and seller. "The goods sold," said Mr. Justice STORY, "must be separated, and identified by marks or numbers, so as to be completely distinguished from all other goods, or from the bulk or mass, with which they happen to be mixed. If they be sold by weight, or measure, or number, the specific quantity must be weighed, or measured, or counted, so as to be separate and distinct from all other similar goods." (Story on Sales, sec. 296.)

The language in which this general rule is expressed would seem to include the principle of the present case. But upon an examination of the cases put by the learned author in illustration of the rule, the precise application of it is shown not

[608] to *embrace the facts of this transaction. In the first instance put by him, the starch had to be weighed to ascertain the quantity; in the second, the skins had to be counted to see whether each bale contained the agreed number; and in the third, the ten tons of hemp had to be weighed from a mass containing thirty tons. All these cases are clearly distinguishable from this case.

When the vendor sells an entire lot of articles, not knowing the number, and at a certain price per article, then a count must necessarily be made before the seller has done all that was material for him to do. So, when an entire lot is sold at so much per pound, or so many pounds out of a larger quantity, and there has been no weighing done, so as to ascertain the quantity in the first case, or to separate the portion sold from the larger mass, in the second instance, there is no delivery; especially when the property remains in the possession of the seller.

But in this case, West had a certain number of barrels, all of the same kind, in the hands of a third person. When each order was drawn and accepted, and the whole number of barrels charged to West, and the proper number credited to each purchaser, there remained nothing further to be done. The further act to be done must be necessary, either to ascertain the quantity or number, so that the parties may know what has to be paid by one, and received by the other, or to separate the quantity from the mass. If the further act be idle, it need not be performed. It must be material. (Story on Sales, sec. 298.) Each purchaser in this case knew precisely what he had to pay, and the warehousemen were responsible to each purchaser for a specified number of barrels.

The title to the entire lot had passed from West to the different purchasers; and the flour remained with Tilden & Little in the same state it would have been in had each purchaser first separated his number of barrels from the mass, and then they had all put them together afterwards. The flour being all of the same kind, and the entire lot sold by West, there was no practical end to be accomplished by marking, counting, or separating. There being no choice, because of there being no difference between the barrels, the parties had the right to let their different portions remain together, and had a loss accrued, without their fault, the same would have fallen upon each in proportion to his share of the whole. Where so many pounds of an article are sold out of a large mass, the same must be weighed, because one pound is not separated from another, but the whole mixed in one undistinguishable mass. But in this case, each barrel was separate and distinct from all the others. They were not mixed, but were easily distinguished, one from another, without weighing, measuring, or counting.

In the cases referred to by the counsel of defendants, [609] the *mass remained in the possession of the seller. This was a material circumstance to show the intention of the parties.

The strongest case cited by defendants is the case of *Suydam v. Jenkins* (3 Sandf. 614). In that case, plaintiff had a receipt in store for five hundred barrels of flour, given by Gillet, the owner of a flouring-mill. At the time the receipt was given, Gillet had on hand six hundred barrels, and the five hundred barrels were not separated from the mass. And when the sheriff levied, Gillet had sold all of the six hundred but forty-six barrels. He had, however, in the meantime, manufactured other flour of the same brand, which he intended to substitute for that sold, so far as it would go. Under these circumstances the Court held that the title did not pass to the purchaser. But in this case, Gillet was the manufacturer and the seller, and was not a warehouseman. It was evident, from the fact that he had sold most of the five hundred barrels, and was manufacturing more of the same brand, to supply the place of that sold, and from the other circumstances of the transaction, that the sale was an executory contract in fact.

But the case of *Riddle v. Varnum*, (20 Pick. 280,) is a case which supports the view we have taken. The object is to ascertain the intention of the parties. If they intend it as an absolute transfer, then it is so as between themselves. In the present case there can be no doubt as to the intention of the parties. They considered it an absolute transfer, complete in every particular.

Judgment reversed, and cause remanded.

HARRIS ET AL. v. BARKER ET AL.*

1 SALE AND DELIVERY BY WAREHOUSE RECEIPTS.—A delivery of a warehouse receipt, stating that the goods named therein are deliverable on return of the receipt, is sufficient *prima facie* to pass the title. There is no substantial difference in this respect between a warehouse receipt and a bill of lading.

IDEM.—When the defendants show that the person to whom, in his own name, the receipt was given, and who passed it to plaintiff, was their agent, or broker, acting for them, but permitted to keep it on storage in his own name, they do not rebut the *prima facie* case made out by the plaintiffs, by the possession of the receipt.

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

In December, 1853, Hussey, Bond & Hale sold to Barker & Paddock a large quantity of flour, in store at the warehouse of Tilden & Little. A portion of the purchase money was paid in hand, and the remainder was to be paid at stated periods, with the understanding that Barker & Paddock might withdraw any portion of the flour, from time to time, by paying the full price *for the portion withdrawn. On the 21st of Jan- [610] uary, 1854, Barker & Paddock paid Hussey, Bond &

*See same case, 6 Cal. 489; ante 603, 11 Cal. 393.
1. Cited *Ghirardelli v. McDermott*, 22 Cal. 541.

Hale for several hundred barrels, including three hundred and twenty-four barrels of Haxall. For this lot a delivery order was drawn by Hussey, Bond & Hale, on Tilden & Little, in favor of J. R. West, the broker of Barker & Paddock. West surrendered this order to Tilden & Little, who gave him a warehouse receipt for the flour, in which they contracted to deliver the same upon return of the receipt. This receipt was passed by West, without indorsement, to plaintiffs, who surrendered the same to Tilden & Little, and took a warehouse receipt for three hundred and twenty-four barrels of Haxall flour. The flour was seized by the defendants, and plaintiffs brought this suit, in which they recovered judgment, for the value of the three hundred and twenty-four barrels of Haxall flour. The defendants moved for a new trial, which was granted, and the plaintiffs appealed.

The case was before this Court in October, 1856, and will be found reported in 6 Cal. 489.

Shafter, Park & Shafter, for Appellants.

No segregation of the three hundred and twenty-four barrels of Haxall from the bulk was necessary. Upon this point we refer to the argument and authorities cited in the other case between the same parties.

If segregation was necessary, then it had been accomplished before the seizure by the defendants, and that has been once so held in this case.

This ruling forecloses the question entirely in this action. (*Clay v. Hoagland*, Oct. T. 1855.)

It is, moreover, a correct decision, and should not be disturbed.

This brings us to the real question in the case, and that is—Did the possession of the receipt and indices of title by the plaintiffs, in connection with the conduct of the defendants relative thereto, *prima facie* show title in the plaintiffs?

It is unnecessary to go over the history of commerce and commercial law for the purpose of tracing the growth of the principles applicable to the subject. It is sufficient to say that bills of lading, warehouse-receipts, etc., are now universally regarded as furnishing evidence of title sufficient to establish the fact of ownership.

In *Wilkes and Fontaine v. Ferris*, 5 Johns. 335, a case universally cited upon this point, it was held, in case of a receipt of sugars received from A, "to be at his disposal upon paying storage," that the sugars were delivered by the delivery of the receipt (to a third party), and that it "was the regular documentary evidence of title, and gave to such third party the command of the sugars." The case does not disclose any indorsement of

the receipt, but only a transmission; a mere delivery of [611] the receipt being regarded as a sufficient manifestation of design to execute his right of "disposal" upon the point of the original depositor.

The above case is cited and adopted by the Supreme Court of the United States in *Gibson v. Stevens*, 8 How. 384. The intention of the parties, as manifested by delivery of these "evidences of title," is to be regarded by the Court, "without embarrassing it with needless formalities." The duty of the Court to take judicial notice of these customs of trade is fully declared. (*Gardner v. Howland*, 2 Pick. 599; *Brown v. Peabody*, 3 Ker. 121; *Bank of Rochester v. Jones*, 4 N. Y. 497.)

All the above cases establish that these receipts are evidence of ownership of the goods, in the possessor of such receipts, and that they are transferrable by delivery.

These show possession in us, and possession is conclusive evidence of property, unless a superior title is made out. These defendants only show that, at a time prior to the claim of title, they had been the owners of the property in question. This claim might be set up by any one who preceded us in the chain of title, and if the defendants are correct, it would be sufficient to entitle such former owner to recover, notwithstanding our possession, and the presumptions attending it. We submit that the *onus probandi* is always upon him who attacks the title of the possessor of personal goods, and that that *onus* is not shifted by showing a former interest or title in the assailant.

This action has been once before in this Court, upon which occasion the same point was presented for judgment in the record, and must be presumed to have been passed upon. (*Harris v. Barker*, 6 Cal. 489.)

Such judgment is conclusive in this action. (*Clary v. Hoagland*; *Pingay v. Watkins*, 17 Vt. 379.)

Janes, Lake & Boyd, for Respondents.

Upon the foregoing facts, the Judge at the trial charged in substance that the plaintiffs had made out a title to the three hundred and twenty-four barrels of Haxall flour, and the jury rendered a verdict accordingly. But on a motion for a new trial he became convinced that the charge was erroneous, and granted the motion; and it is from the order granting a new trial that the plaintiffs appeal.

This Court has frequently held that the granting a new trial is mainly a matter of discretion, with which it will not ordinarily interfere, unless there is a palpable abuse of discretion on the part of the Court below. But whether that rule applies to this case or not, the appellants, in order to reverse the order granting a new trial, must show that each and every decision and ruling of the Judge on the trial was correct.

*There are three points in regard to which the plaintiffs [612] failed on the trial to make title to the flour in question:

1. Conceding that West was authorized to sell the flour as agent for the defendants, no title passed to the plaintiffs, because the three hundred and twenty-four barrels were parcels of a larger quantity, and they never were so selected and separated as to enable the plaintiffs to identify them as their own property.

2. The possession of the warehouse-receipt by the plaintiffs was no evidence of a sale by West to the plaintiffs of the flour named in the receipt.

3. If the possession of such receipt should be held *prima facie* evidence of a sale to them by West, yet on the defendants showing that the flour in fact belonged to them, and not to West, it then devolved upon the plaintiffs to show that they were *bona fide* purchasers for value.

The language of the authorities is, that "no sale is complete so as to vest in the vendee an immediate right of property, so long as anything remains to be done between the buyer and seller in relation to the goods." The object of a separation from the bulk or mass with which they happen to be mixed, is, that they may not only be distinguished by the purchaser and identified as his own goods, but that they may be accepted as the identical property embraced in the contract of purchase.

The mere possession of the warehouse-receipt by the plaintiff, was no evidence of a sale by West to them of the flour named in the receipt. It is not such by any custom of trade, nor by authority of adjudged cases.

It has been attempted, and perhaps successfully, to liken warehouse receipts to bills of lading of goods at sea, and to bring them consequently within the principle laid down in *Lickbarrow v. Mason*. (1 Smith's Leading Cases, p. 378.) But the principles of that case go no further than to hold that goods being sold or hypothecated, indorsement and delivery of the bills of lading operate as a transfer of the property.

"The property is transferred by the sale, which sale is just as effectual in passing the property without as with the indorsement of the bill of lading. The only effect of the bill of lading is due to its being a symbol of property. A bill of lading will pass the property upon a *bona fide* indorsement and delivery where it is intended so to operate, in the same manner as a direct delivery of the goods themselves would do, if so intended. But it cannot operate further." (*Lickbarrow v. Mason*, 1 Smith's Leading Cases, Am. Notes, 650.)

So, if goods sold were stored with other goods in a common or public warehouse, as the vendor would not have the key to deliver them, the receipt held by the vendor of the person who has the custody, is considered a proper symbol of delivery. [613] (*Gardner v. Howland*, 2 Pick. 599; *Gibson v. Stevens*, 8 How. 386.)

The precise point contended for is, that the endorsement to, and possession by the purchaser, of a bill of lading or warehouse-receipt, is evidence of a symbolical delivery, a sale being proved.

In this case, however, there is not even an endorsement of the warehouse-receipt to the plaintiffs. They are found in the possession of a receipt which appears to belong to another person.

If the possession of the warehouse-receipt by Horr & Dick should be deemed *prima facie* evidence of their ownership of

the property called for by the receipt, such evidence is rebutted by the defendants showing that the flour in fact belonged to them, and that West was a mere broker. The possession of the warehouse-receipt could confer no more power over the property than would the possession of the property itself.

Now, suppose Horr & Dick in possession of the flour, and Barker & Paddock suing them in trover for it. Barker & Paddock offer the same evidence of ownership as they gave in this case, would it be contended for a moment that Horr & Dick would not be required to show title in themselves? To dispute the correctness of this rule, would be to contend that in all cases the owner of personal property, who has been deprived of it either by theft, force, or fraud, before he can recover it back must be able to prove affirmatively that he did not sell it, and that it was taken from him unlawfully; proof that in the very nature of things it is not ordinarily in his power to make, and which he is never required to make.

BURNETT, J., after stating the facts, delivered the opinion of the Court—TERRY, C. J., concurring.

The counsel of defendants insist that there was no sufficient segregation of the three hundred and twenty-four barrels from other flour. But it is unnecessary to notice this point, as it was determined by this Court when the case was here before, October, 1856. The segregation was decided to have been sufficient.

The next point made by defendant to sustain the order of the Court below in granting a new trial, is that the possession by plaintiffs of the warehouse-receipt issued to West, was no evidence of a sale by West to them, as the receipt was not endorsed, and no other proof was given of an actual sale.

From the testimony, the proof would seem ample to justify the conclusion that West was the broker of defendants, and fully authorized to sell the flour. The only question left is, whether the evidence was sufficient to sustain the verdict of the jury, that there was a sale of the three hundred and twenty-four barrels to plaintiffs.

Chancellor KENT laid it down that "the delivery of the receipt *of the store-keeper for the goods, being the documentary evidence of the title, has been held to be a constructive delivery of the goods." (2 Kent, 500.) And he refers to the case of *Wilkes v. Ferris*, 5 John. 335. The case referred to seems to sustain the position in the text, although the facts of the case are not very clearly stated as to the question whether the store-keeper's receipt was endorsed, or not. So, it is stated in Story on Sales, section 311, that "the delivery of the key of a warehouse containing the goods sold, or of the bill of lading of goods at sea, or of the receipt, ticket, sale-note, dock-warrant, certificate, bill of parcels, or other usual type and evidence of title to goods in the situation of those sold, will be a sufficient constructive delivery of them to pass the title." "So, also, the delivery to the vendee of an order on the warehouseman in

whose warehouse the goods are stored, is sufficient to pass the title, but not to destroy the lien of the vendor." (Sec. 312; the same doctrine is laid down in Story on Contracts; Secs. 810, 792.)

It was said by GARDINER, C. J., in delivering the opinion of the Court, in the case of *Brower v. Peabody* (13 N. Y. 126), that "the receipts, although recognized as *prima facie* evidence of property in the thing receipted, in those who have them in possession, do not, it is presumed, enter into the currency, and, like bank-notes, become the property of a *bona fide* holder." The receipts, in that case, had been stolen, and the holder, upon that fact being established, was held not entitled to the property mentioned in the receipts. So, in the case of the *Bank of Rochester v. James* (4 Den. 489), it was said that the title to goods might be transferred by the delivery of the bill of lading, if done with the intent. The same was substantially stated in *Stanton v. Small*, 3 Sandf. 240.

It seems to be well settled, that a delivery of a bill of lading for goods at sea will pass the title. (Story on Contracts, Sec. 810; 2 Kent, 500; 24 Pick. 42; 5 John. 335.)

But it must be conceded, that while the language of these authorities seems to be clear, that a delivery of a warehouse-receipt, without assignment, is sufficient *prima facie* to pass the title, there are very few adjudged cases where the facts fully sustain the opinion expressed. However, upon principle, reason, and convenience, it is difficult to draw any substantial distinction between a bill of lading and a warehouse-receipt. If the delivery of the one can pass the title to the property described therein, the delivery of the other should have the same effect. There is no substantial difference in the two cases. In this case the flour was "deliverable," not to West, or his order; but "on return of the receipt." From the terms of the receipt it seems to have been intended to pass from hand to hand, without endorsement.

But conceding that the possession of the receipt was [615] *prima facie* evidence of the ownership of the property specified, the defendants insist that such presumption was rebutted by their showing that the flour in fact belonged to them, and that West was a mere broker.

The fact that the property was originally purchased of H. B. & H., by the defendants, did not rebut the *prima facie* case made out by plaintiffs; because the case so made out consisted in showing that West was the agent of defendants for the sale of the flour, and was permitted to keep it on storage, in his own name, and the receipt given to their agent was found in the possession of plaintiffs; which fact was, in effect, the same as if the receipt had been given to defendants in their own names, and had afterwards been found in the possession of the plaintiffs. The plaintiffs traced their title, through West, to defendants, and they cannot rebut such a case by showing they once had the

title. When they show that they once had the title, they only show what the plaintiffs had already shown.

Our conclusion is, that the testimony was sufficient to warrant the verdict, and that there was no error in the refusal of the Court to give the instructions asked for by the defendants, and no cause for granting a new trial.

The order of the Court below is reversed, and that Court will enter judgment for plaintiffs.

GOODWIN v. GARR.

PERSONAL PROPERTY—POSSESSION EVIDENCE OF TITLE.—Possession of personal property is *prima facie* evidence of ownership. The possession of the servant is the possession of the master.

APPEAL from the District Court of the Tenth Judicial District, County of Yuba.

This was an action to recover the value of thirteen mules and six horses, attached by defendant, sheriff of Sutter county, as the property of one Ford. The defendant denied that the property belonged to the plaintiff, and also justified under the attachment. On the trial the plaintiff proved, by one Lynch, that he had been in possession of the stock for some few days before he employed witness to keep them; that he spoke to witness, and employed him to pasture the animals on his ranch, and a few days afterwards sent them out to him; and that witness had them in possession, as agent of plaintiff, for more than a month, when they were seized by the defendant. The plaintiff, after proving the value of the animals, rested his case, and defendant moved for a nonsuit, which was overruled. No testimony was offered on the part of defendant, and the plaintiff had judgment. *A motion for a new trial was made and over- [616] ruled, and the defendant appealed.

C. H. Bryan, for Appellant.

The plaintiff suing, not for the possession of the property, but for the value, and for damages for the wrongful detention, merely shows that the property was driven upon a ranch some six weeks before the sheriff seized it as the property of another, under regular process, and that the same was left upon the ranch as the property of plaintiff, and was in the possession of another party than plaintiff at the time of the commencement of suit, and showing value. He then rests his case.

A motion for a nonsuit is made and overruled, and the ruling excepted to. The Court orders judgment for a large amount of money upon such proof.

"Where the issue raises the question of title, the plaintiff must prove, at the time of the caption, he had the general or a special property in the goods taken, and the right of immediate and exclusive possession." (2 Greenleaf's Evidence, 561.)

"If issue be joined on the right of property, the plaintiff must prove either a general or special property, in the goods or cattle at the time of the taking; a mere possessory right is insufficient." (2 Starkie's Ev. 969; *Wheeler v. Train*, 3 Pick. 255; *Morris on Replevin*, 123; 5 Mass. 303.)

In *Morris on Replevin*, 123, the following language is used:

"The plaintiff must first prove that he has a right to maintain his writ of replevin, by showing that he has either an absolute or special property in himself. It will not be enough for him to show the mere fact of the naked possession of the property."

Possession is *prima facie* evidence of ownership as to personal property only, where title is not involved, and where the issue of title is not tendered and made in the pleadings.

J. O. Goodwin, Respondent, in person.

The first proposition we lay down is, that the plaintiff can, of course, bring his action in all cases of conversion of property without his consent, and this he may do, whether taken from his possession, or whether he has delivered it to his agent to keep for him, and it is taken out of the agent's possession by defendant.

We leave this proposition by simply referring to the following authorities: *Thorp v. Burling*, 11 John. 286; *Holt v. Johnson*, 14 Id. 425; *Putnam v. Wyley*, 8 Id. 432; 14 Id. 87, 406; 20 Id. 465; 1 Wend. 109; 2 Id. 475; 1 Chitty, 155; 1 Id. Pl. 160; 3 Black. Com. 148.

As to the first point relied upon by defendant, that possession will not entitle the plaintiff to recover, without further [617] proof as to how he (plaintiff,) became possessed of such property, it is not a correct legal proposition, and consequently not supported by authority; the true rule being, that a mere naked possessor of property without right, may bring his action for such property; and evidence of his possession, either by himself or his agent, will be sufficient to maintain the action, possession being always *prima facie* evidence of ownership.

And to such a case, it would not be sufficient for defendant to set up property in a third party, unless such allegation should be followed by proof of a paramount title in such third party, and further proof, showing some right or claim to such property, derived by defendant from the true owner. The authorities are full, and without contradiction, upon this point. (See 11 Wend. 54; 16 Id. 562-71; 15 John. 160.)

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

The only question in the case is, whether plaintiff, by his proof, made out a *prima facie* right to recover in the entire absence of any proof on the part of the defendant.

We think the proof ample to show title *prima facie* in plaintiff. Possession of personal property is *prima facie* evidence of owner-

ship. (2 Cal. 373.) The possession of the servant is the possession of the master. (1 Cal. 161.)

In this case the plaintiff had possession for some considerable time before the seizure, and exercised dominion over the property.

Judgment affirmed.

REYNOLDS v. HARRIS.

FINDINGS, HOW AUTHENTICATED.—The findings of a Court, like the verdict of a jury, is a matter of record, and copies thereof may be sufficiently authenticated by the certificate of the clerk.

IDEM.—It follows that the finding need not be embodied in a statement or bill of exceptions.

APPEAL from the District Court of the Eleventh Judicial District, County of Placer.

The appeal in this case having been dismissed on the ground that there was no properly authenticated statement or bill of exceptions, and a rehearing being denied on the ground that the finding of the Court below was of itself no part of the record, unless embodied in a statement or bill of exceptions properly authenticated; and the appeal in this case being entitled to a hearing if the finding of the Court below is properly before this Court, and a review of the former opinion in this case being asked by several members of the bar of this Court:

*BURNETT, J., delivered the opinion of the Court— [618]
FIELD, J., concurring.

We have been asked by several members of the bar, as *amici curiæ*, to review our opinion in this case denying the motion for a rehearing. The question of practice is one of great importance; and as the *remittitur* has not yet been transmitted to the Court below, we most cheerfully accede to the request.

We have been referred to a number of decisions heretofore made by this Court, most of which have no bearing, direct or remote, upon the precise point involved. The precise question seems not to have been directly decided.

The one hundred and seventy-third section of the code requires the clerk to immediately record the verdict of the jury in full in the minutes; and the one hundred and seventy-eighth section requires the clerk to make an entry in the minutes, specifying the time of trial, the names of the jurors and witnesses, and the verdict, and, when a special verdict is found, either the judgment rendered thereon, or, if the case be reserved for argument or further consideration, the order thus reserving it.

From these provisions, it seems clear that the verdict must be

1. Cited *Lucas v. San Francisco*, 28 Cal. 595; denied, *Imperial S. M. Co. v. Barstow*, 5 Nev. 254.

recorded in full in the minutes; and, therefore, there can be no object in putting the verdict into the statement. The verdict, when entered, becomes a matter of record, and can be authenticated by the signature of the clerk, under the seal of the Court.

The code, in requiring a statement to be annexed to the record of the judgment or order appealed from, must have intended that the statement should contain that which was not otherwise matter of record. The object was to make that matter of record which, without the statement, would not be such. For this reason, the code says the statement shall "contain the grounds on which the appellant intends to rely on the appeal, and so much of the evidence as may be necessary to explain the grounds, and no more." Whatever, therefore, would be matter of record without the statement, need not be included in it.

If, then, the verdict be a matter of record without the statement, will the finding of the Court, which stands in the place of the verdict, and equally forms the basis of the judgment, be such without the statement? There is no provision of the code requiring the finding to be entered in the minutes; but it must be filed with the clerk. (Section one hundred and eighty.) The reason why the verdict is required to be entered in full in the minutes, and the finding simply to be filed with the clerk, is obvious. The verdict is only signed by the foreman, and yet it must be concurred in by all the jurors; and, for this reason, the verdict is required to be entered in full, and read over to the jury in presence of the Court. But the finding of the Judge is his single act; and his signature, and the filing with [619] the clerk, *are sufficient to make it matter of record. The statement itself becomes a record when certified by the Judge and filed with the clerk. And it may become a matter of record without the certificate of the Judge. (Secs. 338-9, 341-2.) It would seem, therefore, that the signature of the Judge and the filing with the clerk would make both the finding and the statement equally matters of record; and, if matters of record, copies of them may be sufficiently authenticated by the certificate of the clerk.

I think the rehearing should be granted.

PORTER v. HERMANN.

PLEADING—INSUFFICIENT ALLEGATION OF FRAUD.—A complaint, alleging that the defendant collected and received certain money, as the agent, or attorney in fact, of the plaintiff, and had embezzled and converted the money to his own use, and praying that he be adjudged guilty of fraud, and for judgment and execution against his person and property, is insufficient to sustain a verdict convicting the defendant of fraud.

IDEM.—CONSTRUCTION.—The allegation is, in substance, that the defendant collected the money as *agent*, or, if not as *agent*, then as *attorney in fact*.

IDEM.—CAPACITY TO BE DISTINCTLY AVARRED.—Where the character or ca-

capacity in which a party is alleged to have acted is essential to the charge of fraud, that character or capacity must be averred in direct and positive terms, or the charge must fail.

VERDICT, ERRORS NOT CURED BY.—A charge in the alternative cannot be cured by verdict, nor by a judgment by default.

ATTORNEY IN FACT AND AGENT DEFINED.—The words "attorney in fact" are not synonymous with the term "agent."

IDEM.—Attorneys in fact act under a special power created by deed; the term agent includes all classes of agents, and an agent is not necessarily an attorney in fact, though an attorney in fact is an agent.

FRAUD—NOTICE IN SUMMONS.—*Per Burnett, J.*—Where judgment by default is entered in an action against a party for fraudulently converting money of the plaintiff, the summons must have apprised the defendant that, on failure to answer, judgment would be taken against him for the fraud; a mere notice in the summons that a money-judgment would be taken will not support a judgment for fraud.

IDEM.—Such a proceeding is, in its essential character, a *quasi* criminal proceeding, and the defendant should be distinctly apprised of the facts intended to be proved against him.

IDEM.—**WHAT COMPLAINT SHOULD STATE.**—The complaint should state the facts that constitute the fiduciary capacity, as well as its nature and extent.

IDEM.—**ESSENTIAL AVERMENTS.**—It is necessary, in such a case, to charge not only that defendant received the money as agent, but that he converted it in the course of his employment as such.

APPEAL from the Superior Court of the City of San Francisco.

The complaint in this action alleges the possession, in January, 1856, by the defendant, of eleven thousand one hundred and fifty-six dollars, collected by him "as the agent, or attorney in fact, of the plaintiff," and his embezzlement and conversion of the money to his own use, and prays that he may be adjudged guilty of fraud, and for judgment for the amount and interest, and execution against his person and property. The defendant was personally served, and, failing to answer, his default was entered, and the case went to the jury on the question of fraud, upon which a verdict was rendered in his favor. A motion for *a new trial, on the ground of the insufficiency of [620] the evidence to justify the verdict, was then made and overruled; and subsequently, a motion for judgment, notwithstanding the verdict, was made, and also overruled. The ruling of the Court below, on these motions, is assigned by the appellant as error.

The complaint alleges that, after so receiving the money, the defendant fraudulently embezzled the same, and converted it to his own use, but does not allege that he did so as agent of plaintiff. The summons only contains a notice that if defendant fail to appear and answer, judgment will be taken against him, for the amount claimed in the complaint, and costs. Judgment was entered in the Court below, for plaintiff, for the amount claimed, and in accordance with the verdict of the jury, on the question of fraud.

The plaintiff appealed from the order overruling the motion for a new trial, and from the order overruling the motion for a judgment *non obstante veredicto*.

Shafter, Park & Shafter, for Appellant.

This is a case manifestly within the rule established by this Court, governing the exercise of its power in the matter of granting new trials. (*Dinch v. Sanders*, Oct. T. 1856; *Speck v. Hoyt*, 3 Cal. 413.)

But if we mistake in this matter, then it is insisted that the Court erred in overruling the motion for judgment *non obstante veredicto*.

The default was conclusive upon the question of the truth of all the allegations in the complaint.

The fraudulent conversion was alleged, and the default established the fact for all the purposes of the litigation. (*Harlan v. Smith*, April T. 1856.)

Thereafter, there was no issue to try, for everything, in fact, had been confessed. The issue was not only immaterial, but had no existence in fact, and everything being admitted, a clean case was presented for judgment, *non obstante*. (*Chitty's Pleadings*, 655, 656.)

Hall McAllister, for Respondent.

If the complaint be insufficient to sustain a judgment convicting the defendant of fraud, and authorizing his arrest on final process, the verdict and decision below will be affirmed.

That a judgment has been taken by default, does not dispense with the rule which requires that the proofs shall conform to the allegations, and that the latter must be sufficient to constitute a legal basis on which to predicate the judgment. (*Hall v. Jackson*, 3 Tex. 305.)

If the complaint do not show a good cause of action, the judgment will be reversed, though no objection be taken below. *This was judgment in favor of plaintiff. (*Russell v. Ford*, 2 Cal. 86.)

The case of *Mattoon et al. v. Eder*, clearly establishes:

1. That the complaint must charge, in due legal form, the alleged fraud, and must show enough on its face to authorize the arrest of the defendant on final process.

2. That the fraud must be clearly substantiated by the plaintiff, and the facts on which it is based affirmatively found.

3. That the "liberty of the citizen" is to no extent to be presumed away.

4. That the fraud must be distinctly stated in the judgment. (Jan. T., 1856.)

Does the allegation that it was collected as agent of plaintiff at some time previous to the 3d of January, 1856 (perhaps twenty years, perhaps fifty years prior), and that on the 3d of January, 1856 it was in possession of defendant, established that on that day it must have been in his possession as such agent? Clearly not.

It is not even alleged that from the time of its collection up to 3d of January, 1856, it remained in defendant's possession. For aught that appears, it might have been collected by defend-

ant years previous to the 3d of January, 1856, might have been paid over to the plaintiff, and forthwith loaned to the defendant, as to an ordinary debtor, by the plaintiff.

I hope I have succeeded in my analysis of this allegation, and in showing that the statement that at some time defendant collected a sum of money, as agent of the plaintiff, and that said sum of money was in his possession on the 3d of January, 1856, utterly fails to establish that it was, on that day, in defendant's possession as agent of the plaintiff, particularly where no continuous possession of said sum by defendant, from the time of aforesaid collection, is alleged.

Before leaving the first allegation of the complaint, another part of it attracts attention. It reads, "collected and received by the defendant as the agent or attorney in fact of the plaintiff," etc.

That is, plaintiff substantially says, "I charge defendant with having collected this money as my agent, or if he did not collect it as my agent, charge that he collected it as my attorney in fact."

Is it not clear, according to the elementary rules of pleading, that an alternative averment of this character is utterly worthless—that it amounts neither to a charge against the defendant as agent nor as attorney in fact?

CHITTY, quoting from Stephen on Pleadings, says:

"Pleadings must not be insensible, or repugnant, nor ambiguous or doubtful in meaning; not argumentative [622] nor in the alternative." (1 Chitty's Pleadings, 236; *Griffith v. Eyles*, 1 Bos. & P. 417, 418—Remarks C. J. Eyre, 418; *Cook v. Cox*, 3 Maule & S. 110, 113, 114, 115 and 116; Lord Ellenborough, C. J.)

The Court will bear in mind that there are cases where a defect is cured by verdict, which same defect would be fatal on a judgment by default. Here, plaintiff claims, and can claim, nothing by the verdict, but asserts that he is entitled to a judgment by default.

LORD ELLENBOROUGH decides that the defects of an alternative averment are not cured by verdict, *a fortiori* they are not cured by a judgment by default.

I shall now cite some criminal cases upon this question, for I deem them applicable to a case like the present, where the charge is, to say the least, *quasi* criminal, where the liberty of the subject is seriously involved, and where the punishment, being imprisoned without limit, may prove more onerous and disastrous than a criminal charge of the highest magnitude. (*The King v. Brereton*, 8 Modern Rep. 330.)

An information for a libel in the disjunctive "that he wrote or caused to be written," is bad.

The point also arose in this case, on motion in arrest of judgment. (*The King v. Stocker*, 5 Mod. 137.)

An indictment in the disjunctive for "making and forging, or causing to be made and forged, a bill of lading," is bad. (2

Hawkins' Pleas of the Crown, Ch. 25, Sec. 58; 2 Rolle's Abridg. 81; *Smith v. Mall*, 2 Rolle, 263; *Rex v. Morley*, 1 Younge & J. 222, 225, 226; *Davy v. Baker*, 4 Burr. 2471.)

The rule that pleadings must not be in the alternative stands unaffected by our code.

Van Santvoord, in his Treatise on Pleading, under the New York code, says:

"It was also, and still is a rule, that pleadings must not be in the alternative or hypothetical."

He then refers to the case from 8 Mod., and to that from Bos. & P. which have been already cited, and adds:

"This rule has been repeatedly applied to cases of pleading under the code." (Van Santvoord's Plead. 201, 202.)

One word more as to this allegation of agent or attorney in fact.

The character or capacity in which defendant is charged to have collected the money in question is all essential. It is obvious that he must be charged in one of the characters mentioned in the statute—that is, as agent, factor, or the like, otherwise there can be no pretense for an arrest.

Another important point, as to this allegation of conversion, cannot fail to attract notice.

[623] *There is no averment that the defendant converted the money in question to his own use, "in the course of his employment as such agent."

This is absolutely assential to constitute a compliance with the Pr. Act, Sec. 73, subdivision 2. It is the gist of the whole charge of fraud.

The previous allegation of collection as agent some time prior to the 3d of January, 1856, cannot, by the most forced construction, be so construed with the subsequent statement of conversion as to constitute an averment that it was converted as agent; that is, in the course of his employment as such.

If I understand the principles which have been enunciated by this and other tribunals, in cases like the present, inference, implication, and presumption are to be distinctly discarded in the construction of the pleadings, and the averments are to be full, clear, and pointed. Let these rules be applied to the complaint under consideration, and no single allegation can be found to avail in supporting the charge of fraud.

FIELD, J., after stating the facts, delivered the opinion of the Court.

It is unnecessary to examine the evidence, as we are satisfied that the allegations of the complaint are insufficient to sustain a verdict, convicting the defendant of fraud. The allegations are made, and the verdict is sought in order that the judgment may be enforced by the arrest and imprisonment of the person of the defendant. They must therefore bring the case clearly within the provisions of the statute authorizing arrests, and must be certain and positive, and not ambiguous, argumentative, or

in the alternative. The seventy-third section of the Practice Act specifies the cases in which an arrest may be made. In the present action it is sought to bring the defendant within the provisions of the second subdivision of that section which provides for an arrest. "In an action for a fine, or penalty, or for money or property embezzled, or fraudulently misapplied, or converted to his own use, by a public officer, or an officer of a corporation, or an attorney, factor, broker, agent, or clerk, in the course of his employment as such, or by any other person in a fiduciary capacity, or for misconduct or neglect in office, or in a professional employment; or for a willful violation of duty."

The allegation of the complaint is, that the money was "collected and received by the defendant as the agent, or attorney in fact, of the plaintiff." This is, in substance, an allegation that the defendant collected the money as agent, or if he did not collect as agent, then he collected it as attorney in fact. If the defendant can be charged in this alternative form, he may with the same propriety be charged, in the disjunctive form, with the *collection of the money in every character and [624] capacity specified, thus: That the defendant was in possession of the money collected and received by him as the attorney, or factor, or broker, or agent, or clerk of the plaintiff, or in some other fiduciary capacity. Under no system of pleading would such alternative or disjunctive allegations be permitted. Stephen, in his *Treatise on Pleading*, lays down as rules, that "pleadings must not be insensible, nor repugnant, nor ambiguous, nor doubtful in meaning, nor argumentative, nor in the alternative, nor by way of recital, but must be positive in their form." (377, 388.) Van Santvoord, in his *Treatise on Pleading*, under the code of New York, says: "It was also and still is a rule that pleadings must not be either alternative or hypothetical, as where it was charged that the defendant wrote and published, or caused to be written and published, a certain libel; this was held bad for uncertainty." (200.) In 3 Maule & S., 113, a motion was made in arrest of judgment, in an action of slander, and Lord ELLENBOROUGH, in commenting upon one of the counts in the declaration, says: "If the allegation had been, that he charged and accused the plaintiff of insolvency, by word or act, the count would undoubtedly have been bad; and yet the same answer would apply, that one of the alternatives must have been proved, or the verdict could not have passed for the plaintiff, and that either mode of slander is actionable. * * * The allegation then amounts to this, that the defendant, by words, or by words coupled with acts, slandered the plaintiff in his trade, and, therefore, it is bad, and not cured by verdict, as a charge in the alternative."

Where the character or capacity in which a party is alleged to have collected money, is essential, as in the present case, to the charge of fraud, that character or capacity must be averred in direct and positive terms, or the charge must fall. The defects cannot be cured by a verdict, as stated by ELLENBOROUGH, in the

case above quoted, and it follows, they cannot be cured by a judgment by default.

But it is urged that the words "or attorney in fact," are synonymous with the term "agent," and, therefore, mere surplusage. We do not so understand their import. All attorneys in fact are agents, but all agents are not necessarily attorneys in fact. Agent, is the general term which includes brokers, factors, consignees, shipmasters, and all other classes of agents. By attorneys in fact, are meant persons who are acting under a special power, created by deed. It is true, in loose language, the terms are applied to denote all agents employed in any kind of business, except attorneys at law, but in legal language they denote persons having a special authority by deed. The allegations of the complaint amount, then, only to this, that the money [625] was collected by the defendant, as general or special agent of the plaintiff.

Judgment affirmed.

BURNETT J.—I concur with my brother Field, in affirming the judgment of the Court below.

1. The judgment was by default, and the summons was fatally defective in this, that it did not apprise the defendant that, upon his failure to appear and answer, the plaintiff would take judgment against him for fraudulently converting the property of the plaintiff. The notice in the summons was that "if you fail to appear and answer the said complaint, as above required, the said plaintiff will take judgment against you for the said sum of eleven thousand one hundred and fifty-six dollars and sixty-two cents, interests and costs, etc." Under such a notice, the plaintiff could only take an ordinary judgment upon default for the money demanded. A defective summons will not sustain a judgment by default. (2 Cal. 241.)

2. The complaint does not state facts sufficient to authorize the judgment prayed for. It is only defective in the particular stated in the opinion of my brother FIELD, but it would not, in my opinion, have been sufficient had the phrase "or attorney in fact" been omitted, or had the conjunction *and* been used instead of *or*.

The proceeding against a party for fraudulently embezzling, misapplying, or converting property, in the course of his employment, as agent or in any other fiduciary capacity, is, in its essential character, a *quasi* criminal proceeding, and the defendant should be distinctly apprised of the facts intended to be proved against him. The complaint should state the facts that constitute the party the agent of the plaintiff, if he was but an agent for one especial purpose; and if a general agent, then an affirmative allegation that he was such general agent, either for all purposes of a certain character, or for business purposes of every kind. Agency is usually created by previous contract between the parties, and the contract should be stated. It may be that the whole question of fraud will turn upon the fact

whether the defendant did act in a fiduciary capacity. The facts constituting that fiduciary capacity should be stated with as much certainty, at least, as would be necessary in a complaint where the principal sues his agent for unfaithfully or negligently performing his trust.

In this complaint, it was alleged that on a specified day the defendant was in possession of certain moneys collected and received by him as agent, or attorney in fact. The allegation simply is that defendant collected the money, as agent, not that he then had it in his possession, as such. There is no allegation that he fraudulently converted the same to his own use "in the *course of his employment as such." It is true [626] that he is charged with intending to cheat and defraud. But this is not sufficient. The defendant may have collected the money as agent, and then his agency may have ceased, and he may have wickedly intended to cheat and defraud the plaintiff, and still not have been guilty of the offense specified by the statute. It is not the conversion of money by every agent that will come within the intent of the statute. But the conversion must be made while he is agent, in the course of his employment as such, and contrary to the contract between him and his principal. If money be collected by a banker for a customer, in the usual course of business, and placed to the credit of the customer, and then used by the banker as he usually does the money of his other depositors, this would not constitute fraud;—if the deposit was special, it would.

McFARLAND v. PICO ET AL.

NEGOTIABLE INSTRUMENTS.—PRESENTMENT AND DEMAND, WHEN.—The presentment and demand of commercial paper having days of grace, must be made within reasonable hours on the last day of grace. For the purpose of fixing the liability of endorser, the note or bill is payable on demand at any time within those hours.

IDEM.—REASONABLE HOURS, WHAT ARE.—What are reasonable hours, will depend on the question, whether or not the bill or note is payable at a bank, or place, where by the established usage of trade, business transactions are limited to certain stated hours.

IDEM.—TIME AND PLACE OF PAYMENT.—If there are such stated hours, where the note or bill is payable, the presentment and demand must be made within those hours. But if there are no stated hours, and no place of payment is designated in the note or bill, the presentment and demand may be made either at the place of business or residence of the maker or acceptor.

IDEM.—If at his place of business, it must be within the usual business hours of the city or town; if at his residence, then within those hours when the maker or acceptor may be presumed to be in a condition to attend to business.

IDEM.—NOTICE TO ENDORSER, WHEN—Notice may be given to the endorser, or other parties entitled to notice, immediately after presentment to the maker or acceptor, and refusal by him to pay, although it is not necessary that notice should be given until the following day.

IDEM.—LIABILITY, WHEN BECOMES FIXED.—After due presentment and demand, the liability of the parties becomes fixed. If, however, the

maker of the note chooses after this to seek out the holder, and pay his note, he can do so, and thus save himself from the liability to suit on following day.

1 IDEM.—ACTION, WHEN IT LIES.—For the purpose of fixing the liability of an endorser, the note is payable on demand at any time, during reasonable hours, on the last day of grace; but, for the purpose of sustaining an action, the holder must wait until the following day, as the maker has the whole day to make payment.

NOTARY—CERTIFICATE OF, AS EVIDENCE.—A notarial certificate of presentment and demand, and of protest for non-payment of a promissory note, taken from the record of the notary, is admissible, and is *prima facie* evidence of the facts contained therein, in like manner as the original protest.

IDEM.—It is not necessary that the certificate should state the form of notice given; any notice is sufficient if it inform the party to whom it was given, either in express terms or by necessary implication, that the note has been duly presented at its maturity, and dishonored.

PROMISSORY NOTE, DEMAND AND NOTICE SUFFICIENT.—There is no necessity for protesting a promissory note; a demand for payment, and, upon neglect or refusal to pay, notice to the endorser, are all that is required.

APPEAL from the District Court of the First Judicial District, County of Los Angeles.

This is an action of *assumpsit* upon a promissory note [627] executed *by Carpenter, as principal, and Pico, as surety.

On the last day of grace, during the afternoon, some hours previous to sunset, the note was presented by a notary public, at the request of the plaintiffs, to Carpenter, for payment, which was refused. The note was then formally protested for non-payment, and "notice of protest" given the same afternoon to Pico, by letter addressed to him at his residence, and there delivered to a person, in charge of the residence, of proper age and capacity—Pico being at the time absent. The only proof of service of notice consisted of a certified copy of the entry of the notary in his official books.

It appeared on the trial that there were no regular business hours at Los Angeles, the place where the note in question was payable, and the defendant Pico contended that a demand made and notice given, previous to sunset, were premature, and further, that the entry in the notary's books was inadmissible and insufficient. The Court overruled the position of the defendant, and the plaintiff had judgment. The appellant now assigns this ruling as error. The appeal was taken by the defendant Pico.

J. R. Scott, for Appellant.

It is submitted that no legal demand was ever made upon Carpenter. The finding of the Court is that no regular hours of business existed in Los Angeles on the 30th day of December, 1856; hence Carpenter had all of that day in which to pay the note. It has been decided by this Court, in the case of *Wilcombe v. Dodge*, (3 Cal. 260,) where no banking hours or

regular business hours are proved to exist, that all day means to the setting of the sun. (*Toothaker v. Cornwall*, 4 Cal. R. 28.)

It has been further decided by this Court, in the case of *Wilcombe v. Dodge*, above cited, that the maker has all day of the last day of grace in which to pay his note; that is to say, if payable in banks where banking hours exist, he must pay during banking hours; if payable at a place where regular business hours exist, before the close of business hours; where no business hours exist, then before sunset. Therefore, it is evident, from the previous decisions of this Court, that Carpenter had until sunset to pay this note. The demand was made upon Carpenter in the afternoon of the last day of grace, and before sunset.

It is submitted that this demand was premature. The best test of this is: Would a suit have laid against Carpenter at the time the demand was made, or immediately thereafter, upon his refusal to pay? Certainly not. See cases above cited, where this Court held that a suit brought upon the last day of grace was premature, the party having all day in which to pay. Such is the doctrine clearly established by this Court in the case above cited.

*It would be a contradiction in terms to say that the [628] plaintiff had a right to demand payment of the note of defendant Carpenter, when he, Carpenter, had a longer time in which to pay. He clearly had until sunset of the last day in which to pay his note, and a demand made previous to that time, might have as well been made one week as one hour previous, a demand in either case being equally premature and inoperative.

The next proposition submitted by appellants is, that there is no proof of the service upon Pico of sufficient notice of the non-payment. The plaintiffs offer in evidence a certified copy from the record of Kimball H. Dinmick, a notary public of Los Angeles county.

These certified copies from the record of the notary are all of the evidence given upon the trial, of the protest of the note for non-payment by Carpenter, and notice thereof to Pico.

Now, what does the copy of the certificate of the notary purport to be in this case? He merely certifies that he served notice of protest upon Pico by letter addressed to Pico, left with a person at his house, in charge thereof. No copy of the notice left purports to be given, neither are the contents thereof given, nor does the certificate state that the notice was signed by any person whatever.

It is submitted that this is not sufficient proof of notice; but the proof of the character of the notice given is requisite in all cases, in order that the Court may judge of the sufficiency thereof. Such is the doctrine of all the authorities upon this subject. (*Smith's Com. Law*, p. 247; *Bank of Alexandria v. Swan*, 9 Pet. 33; *Penschaw v. Macy*, 9 Met. 174; *Gilbert v. Dennis*, 3 Met. 495; *Mechanics' Bank v. Merchants' Bank*, 6 Met. 25;

Story Prom. Notes, secs. 348, 301; *Miles v. U. S. Bank*, 11 Wheat. 431; *U. S. Bank v. Carneal*, 2 Pet. 543; *Ransan v. Mack*, 2 Hill. 587, 593; *Reidy v. Seizes*, 2 Johns. Cas. 337; Chitty on Bills, 466, '7, '8, '9, and notes; 2 Greenl. Ev., Sec. 186.)

Let us for the moment examine our statute law upon this subject.

This transaction took place under the act concerning notaries public, passed April 30, 1853. (Comp. Laws, 902, 903.) Section 4 of said act gives notaries power to protest foreign bills of exchange for non-acceptance or non-payment.

Section 5 gives them power to protest inland bills of exchange and promissory notes. No authority is given in either of those sections for the notary to give notice of non-payment.

Section 9 of said act makes the certificate of the notary *prima facie* evidence of his official character and the truth of the facts therein set forth.

Section 10 declares that the original protest of a notary public, under his hand and official seal, of any bill of exchange; etc., *and the service of notice upon any or all of the parties to any such bill or note, shall be *prima facie* evidence of the facts contained therein—clearly meaning the original protest and the original notice. An exception is made to this rule in the last three lines of this section, which allows the certificate of the notary drawn from his records, stating the protest and the facts contained therein, to be evidence in like manner as the original protest.

Thus it clearly follows that the Legislature, by section ten, intended to exclude as evidence, a copy drawn from the record, of notice of non-payment, and only to admit the original notice. Said section, down to the third line from the bottom, speaks only of original protests and notices, hence it follows, from said section, that only the original notice of non-payment can be given in evidence; but that either the original or a copy of the protest, drawn from the record of the notary, may be used—clearly making a distinction between the protest and notice.

It is submitted that this decision of the Court below, if sustained, would go to establish a very dangerous doctrine; a doctrine unknown to the common law, and unauthorized by any legislative enactment of this State, being nothing more or less than making the notary a judicial officer, to judge of the sufficiency of the notice of protest, which, it is submitted, is entirely a question of law for the Court, upon an examination of the notice itself.

McDougall & Sharp, for Respondents.

The demand, in this case, was made upon the maker, during the day-time of the last day of grace. This is said to be premature, and counsel cite *Wilcombe v. Dodge* (3 Cal. 260); and *Toothaker v. Cornwall* (4 Cal. 28). Without entering into a criticism of the opinion cited, respondents will endeavor to produce

the rule, as it has been uniformly established by writers and Courts of authority. (Story on Bills, Sec. 469; Story's Prom. Notes, Sec. 226.)

The general answer to be given to such inquiry is, that it must be within reasonable hours during the day. If there be a known usage or custom of trade in the town or city, that will furnish the proper rule to govern the holder, for then the presentment must be within the hours limited by such custom or usage, or if there be no such custom or usage, then within the reasonable hours of transacting business. If the presentment is made at unseasonable hours, either too early or too late, at a bank or banker's or at the counting-house, or at the dwelling-house of the maker, etc., the presentment will be a mere nullity, and without any legal effect.

(Chitty on Bills, Ch. 7, p. 303; Bayley on Bills, Ch. 7, p. 224; Thompson on Bills, 420-424; *Burridge v. Manner*, 8 Camp. 193; **Moline, ex parte*, 19 Ves. 216; *Bank of Alexandria v. Swan*, 9 Pet. 33.) See a collection of the modern cases, English and American, in the notes to Story on Prom. Notes, Sec. 226.

About this position there is no conflict of authority, and about the reasonableness and soundness of the rule there is no room for argument.

The same authorities governing the last question, decide also the question of notice as to time; this is, however, unimportant, as the Court, upon sufficient testimony, found the notice given after sunset.

It is insisted, by appellants, that a certified copy of the entry of the notary, in his notarial-record, that he had served notice of protest on Pico, was inadmissible. It is not correct, as assumed, that the Court below held this entry as conclusive. It was held competent, and no testimony was introduced to rebut it; indeed, the entire testimony of defendant goes to establish the fact of notice, the controversy being over the question of time. The point made is a criticism of the provisions of the act concerning notaries. (Comp. Laws, 902, 903.)

In reply to this criticism, it is thought sufficient to call the attention of the Court to the clear and obvious intent and meaning of the act. The whole object of protest and notice is to charge the endorsers, and to make the certified copy of one half of the record evidence, and the other half not, was certainly never contemplated, and is as certainly not the meaning of the law; and more than this, the testimony introduced by the defense is a substantial admission, sufficient to justify a Court or jury in finding in the fact.

It is contended that there is no sufficient proof of the form of notice.

In reply, we say, no form of notice is required. It may be either verbal or written, and it is sufficient if it advise the party, with reasonable certainty, that the note had been dishonored. (2 Greenleaf, Sec. 196, and cases cited; *Mills v. Bank of U. S.*,

6 Cond. 376; *Bank of Alexandria v. Swan*, 9 Pet. 33; *Edbert v. Dennis*, 3 Met. 500; *Reedy v. Seizes*, 2 John. Cas. 337.)

The question in this case was, whether or not there was evidence of notice to Pico, that the note was dishonored; and, upon the testimony before the Court, there could not have been any reasonable doubt; the time, in fact, being the only matter in dispute.

FIELD, J., after stating the facts, delivered the opinion of the Court—TERRY, C. J., and BURNETT, J., concurring.

In support of the position, that the demand and notice were premature, the defendant's counsel cites the case of *Toothaker v. Cornwall*, 4 Cal. 28. In the opinion delivered in that case,

[631] *the Court say, that when a note is payable in bank, notice of non-payment may be given to an endorser on the evening of the day on which the note is payable after the close of banking-hours; and when the note is not payable in bank, notice may be given on the evening of the day it is payable at the close of the usual hours of commercial business; and in places where there are no regular hours of business, the notice may be given after sunset. There is no doubt that notices may be given at the times mentioned, if presentment and demand have been made, but the inference from the language of the opinion is, that notices given at an earlier period of the day, would be premature; and this is what the Court intended to decide, for in that case, notice given at from four to four and a half o'clock P. M., of the day on which the note was payable, was held insufficient, not on the ground urged by counsel, that there had been no demand and refusal, but on the ground that the record did not disclose that the time was after the expiration of the usual hours of business, and the Court necessarily knew that in midsummer the hour was far from sunset.

The rule thus laid down would be conclusive of the present appeal, if that case were held binding upon us. We would not disregard a decision of this Court, deliberately made, unless satisfied that it was clearly erroneous. But the highest regard for the doctrine of *stare decisis* does not require its observance when a plain rule of law has been violated. The decision in *Toothaker v. Cornwall*, is in direct conflict with the law, as to presentment and notice, as settled by all the authorities, both of England and the United States. And besides, the rule, as laid down in that case, is one of great inconvenience to holders of commercial paper, and of no possible benefit.

The general rule as to the presentment and demand of commercial paper having days of grace, is this: the presentment and demand must be made within reasonable hours during the last day of grace. For the purpose of fixing the liability of endorsers, the note or bill is payable on demand at any time during those hours. What are reasonable hours, will depend upon the question, whether or not the note or bill is payable at a place or bank, where, by the established usage of trade, business

transactions are limited to certain stated hours. If there are such stated hours, where the note or bill is payable, the presentment and demand must be made *within those hours*; but if there are no stated hours, and no place of payment is designated in the note or bill, the presentment and demand may be made either at the place of business, or residence of the maker or acceptor; if at his place of business, it must be *within* the usual business hours of the city or town; if at his residence, then, *within* those hours when the maker or acceptor may be presumed *to be in a condition to attend to business. [632] Story in his Treatise on Promissory Notes, section 226, says:

“Having thus ascertained the time when a promissory note becomes due, and payable, * * * let us now pass to the consideration of the time and mode in which payment is to be demanded on the day of the maturity of the note; and in the first place, within what hours of the day the presentment for payment is proper and allowable. The general answer to be given to such an inquiry is, that it must be *within reasonable hours*, during the day * * *. If there is a known custom or usage of trade in the town or city, that will furnish the proper rule to govern the holder, for then the presentment must be *within* the hours limited by such custom or usage * * *.”

In *Parker v. Gordon*, 7 East, 385, an inland bill was accepted, payable at a banker's in London. On its maturity, it was presented at the banker's, after the usual banking-hours, when the bank was closed, and it was held that the presentation was too late. LAWRENCE, J., said: “But where a bill is accepted in this manner, it must be understood by all parties concerned that it is to be presented for payment at the banker's, *within the usual hours of business*; and not having been so presented in this case, there was no evidence of the dishonor of it in order to charge the drawer.” In *Elford v. Teed*, (1 Maule & S. 28,) a similar decision was made, and Lord ELLENBOROUGH, C. J., said: “There was not any text-writer upon whose authority a presentment of a bill by a notary at a house of business after it was closed, could be sustained. It is laid down in *Marius*, 2 Eldw. 187, that it must be made *during times of business*, at such reasonable hours as a man is bound to attend, by analogy to the *horæ juridicæ* of the Courts of Justice.”

In *Staples v. Franklin Bank*, (1 Met. 43,) the note was presented and payment demanded before eleven o'clock in the forenoon of the last day of grace, and upon a refusal of payment, suit was immediately commenced, and the Court held that the maker of the note was bound to pay it *upon demand at any reasonable hour* of the last day of grace, and may be sued immediately after default. The doctrine, so far as authorizing a suit on the last day of grace, is not uniform in the different States; but on the point that a presentment and demand may be made at any reasonable hour on the last day of grace, there is no conflict of authorities. In the case cited, Chief Justice SHAW says: “In-

deed, the rule seems to be settled by all the authorities, English and American, that a demand must be made on the maker, or acceptor, *within reasonable hours* on the day of maturity, and when the bill or note is in bank, which has certain fixed and known hours for being open for business, those will be construed to be reasonable hours."

If the presentment be made at unreasonable hours, too [633] early or *too late, it will be insufficient and unavailing.

In *Barclay v. Bailey*, (2 Camp. 527,) the presentment was made at the drawer's residence at eight in the evening, and it was argued that being so late it was insufficient to charge the drawer, but Lord ELLENBOROUGH said: "I think this presentment sufficient. A common trader is different from bankers, and has not any peculiar hours for paying or receiving money. If the presentment had been during the hours of rest, it would have been altogether unavailing, but eight in the evening cannot be considered an unreasonable hour for demanding payment at the house of a private merchant who has accepted a bill."

In *Wilkins v. Jadis*, (1 Barn. & Ald. 188), Lord TENTERDEN said: "As to bankers, it is established with reference to a well known rule of trade, that a presentment out of the hours of business is not sufficient; but in other cases the rule of law is, that the bill must be presented at a reasonable hour. A presentment at twelve o'clock at night, when a person has retired to rest, would be unreasonable; but I cannot say that a presentment between seven and eight in the evening, is not a presentment at a reasonable time."

In *Munt v. Adams*, (17 M. 230), the presentment was made and payment demanded at eight o'clock in the morning of the last day of grace, and they were held to have been made at an unreasonable hour. In *Dana v. Sawyer*, (22 M. 244,) the presentment and demand were made a few minutes before twelve at night, after the maker had retired to rest, and they were also held to have been made at an unreasonable hour, and therefore insufficient and unavailing.

And notice may be given to the endorser, or other parties entitled to notice, immediately after presentment of the note or bill is made to the maker, and payment refused, although it is not necessary that such notice should be given until the following day. In *Burridge v. Manners*, (3 Camp. 103,) the note was presented for payment in the forenoon of the day it became due, and, in the afternoon of the same day, the plaintiff caused notice of its dishonor to be sent to the defendant. It was urged, on the trial, that this notice was premature, that the maker of the note had the whole of the day it became due to pay it, and till the last minute of that day it could not be considered as dishonored. But Lord ELLENBOROUGH said: "I think the note was dishonored as soon as the maker had refused payment on the day when it became due, and the notice sent to the defendant must have answered all the purposes for which notice in such cases is required. The holder of a bill or note

gives notice of its dishonor in a reasonable time, the day after it is due; but he may give such notice as soon as it has been dishonored the day it becomes due, and the other party cannot complain of the extraordinary diligence used to give him information." (See *Chitty on Bills*, 387; *Moline, ex parte*, [634 19 Ves. 216; *Corp v. McComb*, 1 Johns. Cas., 329; *Bussard v. Levering*, 6 Wheat. 102; *Lindenberger v. Beall*, Id. 104; *Farmers' Bank of Maryland v. Duvall*, 7 Gill. and Johns. 79; *Smith v. Little*, 10 N. H., 526; *Coleman v. Carpenter*, 9 Barr, 178; *King v. Holmes*, 1 Jones 457; *Shed v. Brett*, 1 Pick. 401.)

In this last case, Chief Justice PARKER says, "The principle adopted in England and in this commonwealth, in relation to negotiable securities, is, that after refusal to pay on demand, made on the day when the money is due according to the contract, the note or bill is dishonored, and notice may be immediately given to the drawer or endorser; though it is not necessary it should be given until the day after, or, if the endorser is in another town, by the next mail after the day on which the demand is made. The earliest possible notice of the fact which renders the endorser liable, is the most advantageous to him, as the object of the notice is to enable him to secure himself."

But it is urged by the defendants' counsel that Carpenter had the entire day in which to pay the note, and, therefore, any demand previous to sunset was premature, and he cites *Wilcombe v. Dodge*, 3 Cal. 260. The case only decides that the maker of a note has the entire day on which it falls due, within which to pay it, and that a suit brought on the last day of grace is premature; there is nothing in this decision in conflict with the views expressed in this opinion. For the purpose of fixing the liability of an endorser, or other party entitled to notice, the holder of a note must see that a due presentment and demand of payment are made of the maker, and notice thereof given to the endorser. When this is done, the liability of the parties becomes fixed. The holder can then remain passive. If, however, the maker chooses after this to seek out the holder and pay his note, he can do so, and thus save himself from the liability to suit on the following day. The rule is, that for the purpose of fixing the liabilities of an endorser, the note is payable, on demand, at any time during reasonable hours on the last day of grace; but for the purpose of sustaining an action, the holder must wait until the following day, as the maker has the whole day to make payment. In *Osborn v. Moncure*, (3 Wend. 170,) Mr. Justice SUNDERLAND says: "Notice to the endorser, on the third day of grace, after a demand upon the maker, and his default of payment, is good, although it need not be given until the following day. It being earlier than is required, cannot form any objection on the part of the endorser. The demand upon the maker should be made on the third day of grace, and within a reasonable time before the expiration of the day, and if he then refuses payment, the holder has done all that is incumbent upon him to do, and may treat

it as a dishonored bill, so far as immediately to give [635] notice *to the endorser; but still I apprehend the maker has the whole day to pay it, if he thinks proper to seek the holder."

In *Coleman v. Carpenter*, 9 Barr, 179, Chief Justice GIBSON says: "The contract of the acceptor is to pay on demand, and that it is broken if the bill be not paid the instant it is presented; from which it results that notice may be given the same day. True, an action cannot be brought till the next day, from the anomalous reason that the acceptor may pay after refusal, if he take the trouble to seek the holder. A better one would be, that as there are no fractions of a day but such as are made by statute, or the custom of merchants, the impetration of a writ is an act which covers the whole day."

The notarial certificate was admissible. Section four of the act concerning notaries public, passed in 1853, authorizes notaries public to demand acceptance of and payment of foreign bills, and to protest the same for non-acceptance or non-payment. Section five of the same act authorizes them to demand acceptance of inland bills, and payment thereof, and of promissory notes, and to protest the same for non-acceptance, or non-payment, as the case may require. Section seven requires them to keep a record of their official acts, with certain exceptions, specified in section six, and to give a certified copy of any record in his office, to any person, upon the payment of the fees thereof; and by section ten, the original protest, under the seal of the notary, stating the presentment of the bill, or note, for acceptance, or payment, and the non-acceptance, or non-payment, and the service of notice on any or all of the parties, to such bill or note, specifying the mode of giving such notice, and the reputed place of residence of the party to whom given, etc., is *prima facie* evidence of the facts contained therein; and a certificate of the notary, drawn from his record, stating the protest and the facts therein contained, is made evidence of those facts, in like manner as the original protest. It is evident that the tenth section contemplates an insertion in the protest of the notary, of the fact of service of notice, with specifications of mode, manner and place, and that both the original protest and a certificate from the record of the notary, shall be held equally admissible in evidence. The whole object of the record was to preserve in a permanent form the evidence of the protest, and notice by which the liabilities of parties had become fixed; and it could never have been intended that a certified copy of one half of the record should be evidence, and not of the other half.

But it is urged that, if the certificate of the notary, from his record, was admissible, it did not show the service of any notice sufficient to charge the defendant Pico. The objection is that the certificate does not disclose the form of the notice given, but simply states that *notice of protest* was served upon Pico by letter, addressed to him at his residence, and delivered to a

person *there in charge. of proper age and capacity, Pico [636] being at the time absent. No precise form of words is necessary to constitute the notice. It will be sufficient if it inform the party to whom it is given, either in express terms or necessary implication, that the note has been duly presented at its maturity, and dishonored. It was at one time held essential that the notice should also state that the holder looked to the party notified for payment, but this is no longer requisite, the liability being a legal consequence of the dishonor, which the party must be aware of, from the fact of receiving the notice. (Story, Sec. 353; *Solarie v. Palmer*, 8 Bligh, N. S., 874; *Furse v. Sharwood*, 2 Adol. & Ell. N. S. 388.)

The statute of 1853 provides that a certificate from the notary's record shall be *prima facie* evidence of the facts therein contained. The certificate shows that "notice of protest" was given to Pico. What, then, is the import of the words "notice of protest?" Of what facts are they *prima facie* evidence?

There is no necessity for protesting a promissory note; a demand of payment, and upon neglect or refusal, notice to the endorser is all that is requisite. A formal protest is only necessary with foreign bills of exchange, but in practice, which is sanctioned by the statute, it is customary for notaries to formally protest notes upon a demand of the maker and his refusal of payment; and the idea conveyed by the word *protest*, both in the mercantile community, and among gentlemen of the legal profession, is not merely that a formal instrument has been drawn up by a notary public, but that the paper in question has been dishonored upon due presentation and demand. The merchant who states that he has received notice of protest of certain paper, and the lawyer who offers to prove that notice of protest has been given to the endorser of the paper in suit, both mean the same thing, that the necessary steps have been taken to fix the liability of the endorser—namely, presentment, refusal of payment, and notice given.

The same view is taken of the meaning of the term "protest" by the Supreme Court of New York, in *Coddington v. Davis*. In this case, Mr. Justice JEWETT says: "I think that in mercantile, as well as in legal language, the term 'protest,' used in connection with a promissory note endorsed, as the defendant used it, is understood to mean the taking of such steps as by law are required to charge an endorser—that is, demand and notice." (3 Den. 25.) In *Cayuga County Bank v. Hunt*, 2 Hill, 635, the notarial certificate, which was drawn up nearly two years after the presentment and protest, stated that "*notice of protest*" of the bill in question (which was an inland bill) was duly given to the defendants on the third day of grace, and it was objected that it did not state the presentment was made during office-hours, to which the Court said, Mr. Justice COWEN delivering *the opinion: "We think, therefore, that the certi- [637] cate, in fair construction, imports a presentment during the proper hours of business. These, except when the paper is

due from a bank, range through the whole day down to bedtime, in the evening. It would be quite a forced presumption on the words of an officer saying he presented on such a day, to fix the hour either before or after that when business is usually transacted." In *Platt v. Drake*, (1 Doug. 296,) a notice that a note had been protested for non-payment was held insufficient to charge an endorser, on the ground that no protest was necessary to a promissory note, and that the term, therefore, referred only to the instrument drawn up by the notary, but in *Spies v. Newberry*, (2 Doug. 428,) the same Court held that notice to the endorser of a *foreign* bill of exchange that the bill had been protested for non-payment was a sufficient notice of dishonor, and that the term *protested*, when thus used, implied that payment had been demanded and refused.

In this last case, the Court say: "A protest is a constituent part of a bill of exchange, indispensably necessary to be made, to entitle the holder to recover the amount from the other parties to the bill; and is, by law, made evidence of presentment and dishonor. The words, *protested for non-payment*, in this way, have come to have a technical meaning in matters of this nature. In them is included, not only the idea that the bill is past due, but that payment of it has been demanded, and not being paid, it is, therefore, dishonored. They mean, that the process necessary to dishonor the bill: to wit, demand, refusal of payment, and the drawing up of a formal protest, has been gone through with. All this is included in and meant by the term *protested*. The meaning of this word, as applied to bills of exchange, is well known, well understood, and as the main object of the notice is to put the party upon inquiry, upon his guard, it seems to me this is all that is necessary for that purpose."

In this State, the statute provides for the protest of foreign bills of exchange, inland bills and promissory notes. It requires the same record in all cases, and gives to the certificate of protest of a promissory note, the same effect as to the certificate of a protest of a foreign bill, and if in one case such certificate would, by necessary implication, import a demand of payment and refusal, so it will in all cases.* We hold, therefore, that the certificate that notice of protest has been given by fair intendment, imports a notice of such facts as are sufficient in law to charge an endorser. The certificate states all the facts required by the statute, and to it we must give the effect, also prescribed by statute, of *prima facie* evidence of the facts stated. In the present case, there was no opposing evidence, and the *prima facie* evidence thus became conclusive, so far as fixing the liability of Pico.

[638] *We have intentionally avoided noticing the position taken by the plaintiff's counsel, and urged with great force of argument, that no demand or notice were necessary to fix the liability of the defendant, Pico, as its consideration was not essential to the determination of the case.

Judgment affirmed.

INDEX.

VOL. VIII. 39

609

INDEX.

ACCEPTANCE.

See **BILLS AND NOTES**, 10.

ACKNOWLEDGMENT.

1. **ACKNOWLEDGMENTS, WHO MAY TAKE.**—The recorder of the city of San Francisco is authorized by law to take acknowledgments of mortgages and conveyances. *Hopkins v. Delaney*, 85.
2. **IDEM.—SUFFICIENT CERTIFICATE.**—Where the officer taking an acknowledgment certifies that the parties "were known to him," and omits the word "personally," it is valid. *Id.*
3. **ACKNOWLEDGMENT—CERTIFICATE INSUFFICIENT.**—A certificate of acknowledgment to a deed, in effect as follows: "Personally appeared, etc., A. B., known to me to be the person described in, and who executed the same, freely, voluntarily, and for the uses and purposes therein mentioned," is insufficient. *Bryan v. Ramirez*, 461.
4. **IDEM.**—Such a certificate does not state "the fact of acknowledgment." *Id.*
5. **ACKNOWLEDGMENTS—WHAT CERTIFICATE SHOULD SHOW.**—Acknowledgments to a deed should show that the officer knew the person, and that such person acknowledged to him that he executed the deed. *Henderson v. Grewell*, 581.

See **EJECTMENT**, 1; **REFLEVIN**, 1-3.

ACT OF CONGRESS.

See **LAND**.

ACTION.

See **BILLS AND NOTES**, 26; **CONSIGNOR AND CONSIGNEE**, 5; **COUNTY**, 3; **EJECTMENT**; **FORCEFUL ENTRY AND DETAINER**, 3; **HOMESTEAD**, 3; **JUDGMENT**, 5, 6, 7; **LAND**, 28-33; **MALICIOUS PROSECUTION**, 2; **WATER RIGHTS**, 1.

ADJOURNMENT.

See **JUDGMENT**, 8.

ADMINISTRATOR.

ADMINISTRATOR ENTITLED TO POSSESSION OF PROPERTY.—In this State, all the property, both real and personal, belonging to the estate of a deceased person, goes into the possession of the administrator, who is therefore a necessary party to all suits affecting it. *Hurwood v. Marye*, 580.

ADMISSIONS.

See **INSTRUCTIONS**, 6.

AGENCY.

1. **AGENT, WHEN PRINCIPAL RESPONSIBLE FOR ACTS OF.**—Where the agent, on behalf of his principal, performs an unauthorized act—yet if the principal has put the agent in a position to mislead innocent parties, he is responsible to them. *Davidson v. Dallas*, 2.7.
2. **IDEM.**—And a subsequent general power from the principal to the agent,

- to sue for all sums due the principal, and to execute all instruments necessary to carry the power into full effect, will, as to innocent third parties, bind the principal for obligations incurred in the collection of a loan, which was unauthorized as between the principal and agent. *Id.*
3. *IDEM.*—An indemnity bond to the sheriff to retain property seized under attachment, is an instrument necessary to carry to power to sue into effect. *Id.*
 4. *IDEM.*—**RATIFICATION OF UNAUTHORIZED ACTS OF.**—A ratification of the unauthorized acts of an agent, can only operate after full knowledge of those acts. *Id.*
 5. *AGENT, RATIFICATION OF ACTS OF.*—Ratification by a principal, of the acts of his agent, depends upon the knowledge of those acts on the part of the principal, and where the knowledge is partial, so will be the ratification. *Marziou v. Pioche*, 522.
 6. *AGENT, POWERS, WHEN IRREVOCABLE.*—Where a principal expressly gives a power to collect debts for the purpose of providing the means to return advances made by the agent, there would seem to be no doubt of the irrevocable character of the power. *Id.*
 7. *IDEM.*—**POWER TO SUE.**—The power being irrevocable, the agent has an indisputable right to institute an action to recover the debts due to his principal, even against the objection of his principal. *Id.*
 8. *IDEM.*—**EXTENT OF POWER.**—But where the debts due exceed the advances due the agent, the principal has a right, if his debtor do not object, to limit the agent's right of recovery to the amount due him for advances; the power being irrevocable only to the extent of the agent's interest. *Id.*
 9. *IDEM.*—**POWER OF PRINCIPAL.**—But if the debtor object, the principal has no right to subject him to the costs and expenses of more suits than the parties originally contemplated. *Id.*
 10. *IDEM.*—The fact that the first advance was made by express agreement to bear more than legal interest, raises no implication that subsequent advances should do so. *Id.*
 11. *IDEM.*—And where particular property was pledged to secure the first advance, the proceeds from a sale thereof must be applied to the payment of that advance. *Id.*
 12. *PLEADING—INSUFFICIENT ALLEGATION OF FRAUD.*—A complaint, alleging that the defendant collected and received certain money, as the agent, or attorney in fact, of the plaintiff, and had embezzled and converted the money to his own use, and praying that he be adjudged guilty of fraud, and for judgment and execution against his person and property, is insufficient to sustain a verdict convicting the defendant of fraud. *Porter v. Hermann*, 619.
 13. *IDEM.*—**CONSTRUCTION.**—The allegation is, in substance, that the defendant collected the money as agent, or, if not as agent, then as attorney in fact. *Id.*
 14. *IDEM.*—**CAPACITY TO BE DISTINCTLY AVERRED.**—Where the character or capacity in which a party is alleged to have acted is essential to the charge of fraud, that character or capacity must be averred in direct and positive terms, or the charge must fall. *Id.*
 15. *VERDICT, ERROR NOT CURED BY.*—A charge in the alternative cannot be cured by verdict, nor by a judgment by default. *Id.*
 16. *ATTORNEY IN FACT AND AGENT DEFINED.*—The words "attorney in fact" are not synonymous with the term "agent." *Id.*
 17. *IDEM.*—Attorneys in fact act under a special power created by deed; the term agent includes all classes of agents, and an agent is not necessarily an attorney in fact, though an attorney in fact is an agent. *Id.*
 18. *FRAUD—NOTICE IN SUMMONS.*—*Per Burnnett, J.*—Where judgment by default is entered, in an action against a party, for fraudulently converting money of the plaintiff, the summons must have apprised the defendant that, on failure to answer, judgment would be taken against him for the fraud; a mere notice in the summons that a money judgment would be taken will not support a judgment for fraud. *Id.*
 19. *IDEM.*—Such a proceeding is, in its essential character, a quasi criminal proceeding, and the defendant should be distinctly apprised of the facts intended to be proved against him. *Id.*

20. **IDEM.—WHAT COMPLAINT SHOULD STATE.**—The complaint should state the facts that constitute the fiduciary capacity, as well as its nature and extent. *Id.*
21. **IDEM.—ESSENTIAL AVERMENTS.**—It is necessary, in such a case, to charge not only that defendant received the money as agent, but that he converted it in the course of his employment as such. *Id.*

See ATTACHMENT, 8; ATTORNEY, 1; CONTRACT; TAXES.

ALCALDE GRANT.

See LAND.

AMENDMENTS.

See ATTACHMENT, 1.

APPEAL.

1. **UNDERTAKING ON APPEAL, AMENDMENT OF.**—Where a motion is made in the County Court to dismiss an appeal, on the ground that the undertaking filed is insufficient, and before the determination thereof the other party offers to amend his undertaking: *Held*, that it is error to refuse to allow him so to do. *Cunningham v. Hopkins*, 33.
2. **ORDER DEFINED.**—An order is the judgment or conclusion of the Court or Judge, upon any motion or proceeding, and includes cases where affirmative relief is granted, or relief denied. An appeal will lie from an order refusing to quash an execution. *Gilman v. Contra Costa County*, 52.
3. **APPEAL, UNDERTAKING NECESSARY TO PERFECT.**—Appellants must show, in their transcripts, the necessary bond to affect the appeal, or else, by the certificate of the clerk in the Court below, that the undertaking has been filed, and the time of filing the same. *Bryan v. Berry*, 130.
4. **IDEM.—OBJECTIONS, WHEN TO BE TAKEN.**—Parties intending to take advantage of the failure to file the requisite undertaking, must do so before the case is submitted. *Id.*
5. **IDEM.—STAY OF PROCEEDINGS.**—Notice of a motion to set aside an execution and a levy made thereunder, will not operate as a stay of proceedings. *Id.*
6. **IDEM.—EFFECT OF TAKING.**—Where a judgment is rendered, and an appeal taken to this Court, the Court below loses control over the judgment, and an order amending the judgment is erroneous. *Id.*
7. **IDEM.—WHEN WILL LIE.**—An appeal will lie from an order of the Court below, changing the judgment. *Id.*
8. **APPEAL.—POWER OF LEGISLATURE.**—The Legislature has not the power to impair or take away the appellate jurisdiction of this Court, but it has the power to prescribe the mode in which appeals may be taken. *Haight v. Gay*, 297.
9. **IDEM.—REMEDY, WHEN EXCLUSIVE.**—In all cases where an appeal is given by the Statute, that remedy is exclusive and must be pursued. *Id.*
10. **WRIT OF ERROR, WHEN IT LIES.**—A writ of error will only lie in cases where no appeal is given by the Act of our Legislature. *Id.*
11. **APPEAL, WHO MAY.**—A party aggrieved by a judgment has a right to appeal, although he is not a party to the record. *Adams v. Woods*, 306.
12. **IDEM.—PARTY AGGRIEVED, WHO IS.**—The rule in reference to writs of error, would seem, by parity of reasoning, to apply to the right of appeal; and as to the question, who is the party aggrieved, the test is found in the question—"Would the party have had the thing, if the erroneous judgment had not been given?" If yea, then he is the party aggrieved. But his right to the thing must be immediate, and not the remote consequence of the judgment, had it been differently given. *Id.*
13. **APPEAL, WHAT TRANSCRIPT MUST SHOW.**—Transcripts used on appeal to this Court must show that an undertaking has been filed in due time, and that a notice of the appeal has been duly served upon the other side. *Franklin v. Reiner*, 340.
14. **APPEAL.—MOTION TO DISMISS, WHEN TOO LATE.**—A motion to dismiss appeal, on the ground that the transcript was not filed within the time re-

quired by the third rule of this Court, is too late after the case has been submitted. *Cook v. Clink*, 347.

15. **APPEAL—CONFLICTING TESTIMONY.**—Where the testimony is conflicting, the Appellate Court will not disturb a verdict. *White v. Todd's Val. Water Co.*, 443.
 16. **APPEAL FROM ORDER AFTER JUDGMENT.**—After appealing from a judgment alone, a party may appeal from an order overruling a motion for a new trial in the same case, provided the latter appeal is taken in time. *Murzin v. Pioche*, 522.
 17. **IDEM.—DISTINCT APPEALS.**—Taking distinct appeals may affect the question of costs; but subject to this condition, a party may take them, provided no delay is thereby occasioned. *Id.*
- See **BOND**, 1-3. **COUNTY COURT**; **EQUITY**, 1; **FINDING**, 3, 4; **HOMESTEAD**, 8, 9; **INTENDMENTS**; **NEW TRIAL**, 1, 5; **PRACTICE**, 1-5.

APPEARANCE.

See **JUDGMENT**, 11; **PRACTICE**, 7.

APPROPRIATION.

See **BILLS AND NOTES**, 17; **REVENUE**; **WATER RIGHT**.

ARREST AND BAIL.

1. **ARREST AND BAIL—SURRENDER BY SURETIES.**—The sureties on the bail bond of a defendant, arrested in a civil action, are not bound to surrender the defendant within ten days after judgment against him, unless the plaintiff takes such measures as would authorize the officer to hold defendant in custody. *Allen v. Breslauer*, 552.
2. **IDEM.**—A surrender within ten days after execution, is a sufficient compliance with the Statute. *Id.*

See **AGENCY**, 12-31.

ASSAULT.

See **CRIMINAL LAW**, 11-13, 19, 31-33.

ASSIGNMENT.

See **BILLS AND NOTES**, 12; **CONTRACT**, 10, 11, 12.

ATTACHMENT.

1. **ATTACHMENT—AMENDMENT OF RETURNS.**—The return on an attachment cannot be amended so as to postpone the rights of creditors attaching subsequently, but before the collection. *Webster v. Haworth*, 21.
2. **ATTACHMENT, CLAIM OF THIRD PARTY.**—Where property was seized under two attachments, and the property was claimed by a third party, whereupon both attaching-creditors indemnified the sheriff, who went on and sold it, and paid the proceeds to the first attaching creditor, the amount not equaling his judgment—and afterwards, the party claiming the property, obtained judgment against the sheriff for the value of the property: *Held*, that the recourse must be had against the first attaching-creditor, for whose benefit the property was sold. *Davidson v. Dallas*, 227.
3. **IDEM.**—In such case, the attaching-creditors do not stand in the position of joint trespassers, the seizure of the second being subject to the first. *Id.*
4. **IDEM.—SHERIFF AS AGENT.**—The sheriff was the separate agent of both attaching creditors, but in the order stated, and as he disposed of the property to the benefit of the first alone, he must look to him, and not the second attaching-creditor. *Id.*
5. **JUDGMENT, CONCLUSIVENESS OF RECORD.**—A judgment-record is only conclusive between the parties and their privies, except in some cases for specific purposes. *Id.*
6. **IDEM.**—When a judgment-record is used in evidence, it can only be considered as conclusive evidence, where its operation is mutual, and concludes both parties. *Id.*
7. **ATTACHMENT—TRIAL OF CLAIM TO PROPERTY.**—Where property attached is claimed by a third person, the sheriff may protect himself before a

jury of six persons, and if the verdict be in favor of the claimant, he may relinquish the levy, unless indemnified. If he gives the bond of indemnity, it will only inure to the benefit of the owner of the property, so far as the consequences which result from his own acts are concerned. *Id.*

8. **IDEM.—SHERIFF AS AGENT.**—When the sheriff attaches property of the defendant, he does it as the officer of the law. If it is not the property of the defendant, he is the agent of the attaching creditor. *Id.*
9. **PLEDGE, WHEN A MORTGAGE.**—A pledge of personal property is a "mortgage," within the meaning of the Attachment Act; the word, being there used in its most general signification, meaning "security." *Payne v. Bensley*, 260.
10. **ATTACHMENT, IRREGULARITY IN ISSUANCE OF.**—Where an attachment was issued on a complaint, which was a printed form, with the blanks filled up by the clerk, at the request of plaintiff, but no name signed to it till next day, and after other attachments on the same property, when it was signed by the clerk, with the name of plaintiff's attorney: *Held*, that the action of the clerk, though not correct, was only an irregularity, and the complaint was not void. *Dixey v. Pollock*, 570.
11. **IDEM.—WHO CANNOT COMPLAIN.**—In a contest between the attaching creditors, all the equities are in favor of the most diligent, and an irregularity cannot be taken advantage of by a stranger, to the action in which it occurs. *Id.*
12. **CREDITORS, RIGHTS OF.**—The application of an attaching-creditor, to compel the sheriff to pay over the proceeds of goods attached, there being conflicting claims between several attaching-creditors, may be made by motion. If notice of the motion is not given, by the party moving, to the other attaching-creditors, it is the duty of the sheriff to do so, if he wishes the decision to bind them. *Id.*

See **BILLS AND NOTES**, 18.

ATTORNEY.

ATTORNEY IN FACT—RESTRICTION AS TO POWERS.—An attorney in fact, not being at the same time an attorney at law, cannot sign a complaint for his principal, as "plaintiff's attorney;" and all proceedings under a complaint so signed, are void. *Dixey v. Pollock*, 570.

See **AGENCY**, 16, 17; **CRIMINAL LAW**, 28, 29; **PARTNERSHIP**, 13.

BAILMENT.

See **AGENCY**, 12, 19; **CRIMINAL LAW**, 1-3.

BILLS AND NOTES.

1. **PROMISSORY NOTE—ENDORSEES' LIABILITY.**—Where F. sued on a note which had two endorsements, signed by the payee; the first a receipt from F. for the amount due; the second, in the words "without recourse to me:" *Held*, that there was no presumption that the endorsements were made at different times, or that the payment was a voluntary unconditional payment. *Frank v. Brady*, 47.
2. **IDEM.**—In such case, it was proper for the Court to instruct the jury, as a matter of law, to find for the plaintiff, in the absence of evidence showing a legal or moral obligation on the part of plaintiff to pay the debt of the defendant. *Id.*
3. **PROMISSORY NOTE—ENDORSEER, WHEN UNCONDITIONALLY LIABLE.**—When a party, in consideration of a conveyance of land to him, agrees to pay an outstanding note of his vendor, and writes his name on the back of the note as a memorandum of said agreement, at the same time acknowledging his liability: *Held*, that the liability thus assumed is not the conditional liability of an endorser, but a primary and unconditional obligation to pay the note, for which he had received a full consideration. *Palmer v. Tripp's Admr.*, 95.
4. **IDEM.—CONSIDERATION, PROOF OF.**—In such case, parol evidence of the deed is admissible to prove consideration for the agreement to pay the note. *Id.*
5. **NEGOTIABLE INSTRUMENT, WHAT IS.**—A draft or order by A. on B., to pay

- C., or order, the balance due A. by B., is not a negotiable security, not being for any fixed sum, but if endorsed by B., "balance due, one thousand two hundred and ninety-three dollars and seventy-five cents," over his signature, it becomes a promise by B. to pay C., or his order, that sum, and is negotiable. *Garwood v. Simpson*, 101.
6. **IDEM.—LIABILITY OF NEGOTIATOR.**—Where, in such a case, B. was garrisheed in a suit against C. the day before he made the endorsement, but failed to inform C. thereof, and C., for a valuable consideration, sold the order, as endorsed, to D., an innocent purchaser: *Held*, that B., having made the order negotiable, and put the same in circulation, is estopped from setting up against it, any antecedent matter, and is liable to D. for the full amount thereof. *Id.*
 7. **IDEM.—ENDORSEMENT BY PARTNER.**—And where the order was on a firm, and such an endorsement was made by one of the firm, it operated as a release of the firm, by the holder, and as an acceptance by the partner endorsing. *Id.*
 8. **ACCEPTANCE, WHAT DOES NOT CONSTITUTE.**—*Per Murray, C. J., dissenting.*—Such an endorsement does not constitute an acceptance, under the circumstances, but only a memorandum of the amount due the drawer of the order. *Id.*
 9. **PROMISSORY NOTE DRAWN IN BLANK.**—Where a note is given with the rate of interest in blank, and the holder inserts therein a sum for interest without the knowledge or consent of the maker, it does not become thereby void. *Visher v. Webster*, 109.
 10. **IDEM.—FILLING BLANK.**—To fill a blank in a note is not an alteration thereof, within the meaning of the rule. *Id.*
 11. **PROMISSORY NOTE, INTEREST ON.**—Where a promissory note is payable three months after date, with interest at the rate of — per month, the interest runs from the date of the note. *Devey v. Bowman*, 145.
 12. **NEGOTIABLE INSTRUMENT AS SECURITY FOR DEBT.**—Where a negotiable promissory note, not yet due, is taken *bona fide*, as collateral security for a pre-existing debt, it is not subject to any defense existing at the date the assignment between the original parties. *Payne v. Bensley*, 260.
 13. **PERJURY, WHAT DOES NOT CONSTITUTE.**—Where a defendant executed his promissory note, and the holder thereof brought suit upon it, and set it out in his complaint, and the defendant, in his answer, which is sworn to, says: "That the note set out in the complaint was not his note; that he admitted that about the date of the note sued on he made a note for the same amount to the plaintiff, but that note the defendant was confident, and so charged the truth to be, was not for 'value received,'" and so the defendant denied the note set out in the complaint of the plaintiff: *Held*, not to be perjury, although the averment was in fact untrue. *People v. McDermott*, 288.
 14. **PROMISSORY NOTE, LEGAL EFFECT OF.**—The legal effect of a promissory note is the same, with or without the words "value received." *Id.*
 15. **PROMISSORY NOTE, PAYMENT ON CONDITIONS.**—When the payment of a promissory note is, by agreement of parties, made conditional upon the payment, by the payee, of a certain debt of the payor, such payment is a condition precedent to plaintiff's right to recover, and must be averred in the complaint. *Rogers v. Cody*, 324.
 16. **ACCEPTANCE, CONDITIONAL.**—Where a draft is accepted conditionally, to be paid upon the happening of a contingency, whether the contingency has happened, is a question for the jury. *Nagle v. Homer*, 353.
 17. **IDEM.—DRAFT, WHEN DUE.**—A draft payable in terms, out of an "appropriation" for work done by the acceptor, becomes due on payment for the work by government. *Id.*
 18. **INSOLVENCY—PRIORITY OF ATTACHMENTS.**—Where G. & Co., concealing their insolvency, obtained an extension from their creditor B., and before the maturity of the notes, B. apprehending that G. & Co. would fail before their paper became due, and that the other creditors of G. & Co. would exhaust their assets by attachment—obtained, by an arrangement with G. & Co. an antedated note for the amount due him at the date thereof by G. & Co., on which suit was commenced by attachment, and a levy made upon the property of G. & Co.: *Held*, that B.'s attachment and

- claim were valid against subsequent attaching creditors, the case not being one either of actual or constructive fraud. *Breuster v. Bours*, 501.
19. PAYMENT BY NOTE, EFFECT OF.—Giving a promissory note payable at a future time for a pre-existing debt, does not discharge it. Its only effect is to suspend the right of recovery upon the maturity of the note. *Id.*
 20. NEGOTIABLE INSTRUMENTS, PRESENTMENT AND DEMAND, WHEN.—The presentment and demand of commercial paper having days of grace, must be made within reasonable hours on the last day of grace. For the purpose of fixing the liability of endorsers, the note or bill is payable on demand at any time within those hours. *McFarland v. Pico*, 626.
 21. *IDEM.*—REASONABLE HOURS, WHAT ARE.—What are reasonable hours, will depend on the question, whether or not the bill or note is payable at a bank, or place where, by the established usage of trade, business transactions are limited to certain stated hours. *Id.*
 22. *IDEM.*—TIME AND PLACE OF PAYMENT.—If there are such stated hours, where the note or bill is payable, the presentment and demand must be made within those hours. But if there are no stated hours, and no place of payment is designated in the note or bill, the presentment and demand may be made either at the place of business or residence of the maker or acceptor. *Id.*
 23. *IDEM.*—If at his place of business, it must be within the usual business hours of the city or town; if at his residence, then within those hours when the maker or acceptor may be presumed to be in a condition to attend to business. *Id.*
 24. *IDEM.*—NOTICE TO ENDORSER, WHEN.—Notice may be given to the endorser, or other parties entitled to notice, immediately after presentment to the maker or acceptor, and refusal by him to pay, although it is not necessary that notice should be given until the following day. *Id.*
 25. *IDEM.*—LIABILITY, WHEN BECOMES FIXED.—After due presentment and demand, the liability of the parties becomes fixed. If, however, the maker of the note choose after this to seek out the holder, and pay his note, he can do so, and thus save himself from the liability to suit on the following day. *Id.*
 26. *IDEM.*—ACTION, WHEN IT LIES.—For the purpose of fixing the liability of an endorser, the note is payable on demand at any time, during reasonable hours, on the last day of grace; but, for the purpose of sustaining an action, the holder must wait until the following day, as the maker has the whole day to make payment. *Id.*
 27. NOTARY, CERTIFICATE OF, AS EVIDENCE.—A notarial certificate of presentment and demand, and of protest for nonpayment of a promissory note, taken from the record of the notary, is admissible, and is *prima facie* evidence of the facts contained therein, in like manner as the original protest. *Id.*
 28. *IDEM.*—It is not necessary that the certificate should state the form of notice given; any notice is sufficient if it inform the party to whom it was given, either in express terms or by necessary implication, that the note has been duly presented at its maturity, and dishonored. *Id.*
 29. PROMISSORY NOTE, DEMAND AND NOTICE SUFFICIENT.—There is no necessity for protesting a promissory note; a demand for payment, and, upon neglect or refusal to pay, notice to the endorser, are all that is required. *Id.*

BOND.

1. APPEAL—UNDERTAKING CONSTRUED.—An appeal-bond will be so construed as to carry out the obvious intention of the parties. *Swain v. Graves*, 549.
2. *Id.*—To support the condition of a bond, the Court will transpose or reject insensible words, and construe it according to the obvious intent of the parties. *Id.*
3. *IDEM.*—But, conceding that there is a necessary discrepancy between the condition and the penal portion of the bond, it cannot be set up by the obligors, as the bond would be single, and, in a suit thereon, the plaintiff would be entitled to the full amount. *Id.*

See APPEAL, 1-4; REPLEVIN, 1.

BURDEN OF PROOF.

PLEADING—AFFIRMATIVE MATTER IN ANSWER TO BE PROVED.—Affirmative matter alleged by defendant in his answer, must be proved. *Osborn v. Hendrickson*, 31.

See **FRAUD**, 2.

BURGLARY.

See **CRIMINAL LAW**, 30.

CASES APPROVED.

- Appeal*—*Bryan v. Berry*, 130, in *Franklin v. Reiner*, 340.
Bond on Appeal—*Bryan v. Berry*, 6 Cal. 394, in *Cunningham v. Hawkins*, 33.
Estoppel—*Pierce v. Minturn*, 1 Cal. 470, in *Walker v. Sedgwick*, 402.
Fraudulent Sale—*Stewart v. Scannell*, 89, in *Vance v. Boynton*, 561.
Homestead—*Revalk v. Kraemer*, 66, in *Kraemer v. Revalk*, 75; *Revalk v. Kraemer*, 66; *Dorsey v. McFarland*, 7 Cal. 342, in *Van Reynegan v. Revalk*, 76.
Indictment—*People v. Roberts*, 6 Cal. 214, in *People v. Butler*, 439.
Injunction—*Rickett v. Johnson*, 34, in *Revalk v. Kraemer*, 71; *Chipman v. Hibbard*, 271, and *Phelan v. Smith*, 521.
Insolvency—*Cohen v. Barrett*, 5 Cal. 196, in *Meyer v. Kohlman*, 47; *Adams v. Hackett*, 7 Cal. 187, in *Adams v. Woods*, 158, and *Naglee v. Minturn*, 544; *Heyneman v. Dannenberg*, 6 Cal. 376, in *Walker v. Sedgwick*, 403.
Jurisdiction—*Carpenter v. Hart*, 5 Cal. 406, in *Shaw v. McGregor*, 521.
Mortgage on Homestead—*Revalk v. Kraemer*, 66, and *Kraemer v. Revalk*, 74, in *Cook v. Kliuk*, 353.
Oral Charge—*People v. Beeler*, 6 Cal. 246, in *People v. Payne*, 344, and *People v. Demint*, 424.
Personal Property—*Bailey v. The New World*, 2 Cal. 373, in *Goodwin v. Garr*, 617.
Sheriff's Deed—*Wilson v. Roach*, 4 Cal. 362, in *People v. Boring*, 411.
Summons—*State v. Woodlief*, 2 Cal. 211, in *Porter v. Hermann*, 625.
Tenants in Common—*Throckmorton v. Burr*, 5 Cal. 400, in *Parke v. Kilham*, 79.
Vendor and Vandee—*Salmon v. Hoffman*, 2 Cal. 141, in *Walker v. Sedgwick*, 402.
Vendor's Lien—*Truebody v. Jacobson*, 2 Cal. 269, in *Walker v. Sedgwick*, 402.
Water Right—*Crandall v. Woods*, 136, in *Leigh Co. v. Independent Co.*, 324; *B. R. & A. W. & M. Co. v. New York Co.*, 327, in *Hill v. King*, 339.

CASES CITED.

- Acknowledgment*—*Kelsey v. Dunlap*, 7 Cal. 160; *Welch v. Sullivan*, 165, and *Bryan v. Ramirez*, 461, in *Henderson v. Grewell*, 584.
Alcalde Grants—*Dewey v. Lambier*, 7 Cal. 347, in *Welch v. Sullivan*, 201.
Appearance—*Whitwell v. Barbier*, 7 Cal. 54, in *Deidesheimer v. Brown*, 340, and *Deidesheimer v. Brown*, 340, in *Gray v. Hawes*, 568.
Assignment—*Dewey v. Bowman*, 145, in *Payne v. Bensley*, 267, and *Osborn v. Hendrickson*, 7 Cal. 282, in *Cal. Stm. Nav. Co. v. Wright*, 591.
Attachment on Vessel—*Averill v. The Hartford*, 2 Cal. 422, and *Meiggs v. Scannell*, 7 Cal. 405, in *Fisher v. White*, 422.
Challenge—*People v. Cottle*, 6 Cal. 227, and *People v. Stewart*, 7 Cal. 140, in *People v. Gehr*, 361.
Contract—*Tuaffe v. Josephson*, 7 Cal. 352, in *Swartz v. Hazlett*, 128, and *Riddell v. Blake*, 4 Cal. 266, in *Walker v. Sedgwick*, 402.
Counties—*Price v. Sacramento*, 6 Cal. 254, and *Gilman v. Contra Costa Co.*, 6 Cal. 676, in *Placer Co. v. Astin*, 305.
Criminal Procedure—*People v. Moore*, 90, in *People v. Butler*, 441.
Deed as Mortgage—*Abell v. Calderwood*, 4 Cal. 90, in *Lee v. Evans*, 433.
Ejectment—*Ellis v. Jeans*, 7 Cal. 409, in *Walker v. Sedgwick*, 402.
Error—*Smith v. Compton*, 6 Cal. 24, in *Winans v. Hardenbergh*, 293, and *Turner v. McIlhane*, 575, in *Marziou v. Pioche*, 534.

- Estoppel*—Hoen v. Simmons, 1 Cal. 120, in Walker v. Sedgwick, 402.
- Execution*—Adams v. Haskell, 6 Cal. 113, in Adams v. Woods 158, and Smith v. Morse, 2 Cal. 524; Smith v. Randall, 6 Cal. 47, in Welch v. Sullivan, 186.
- Fraud*—Landecker v. Houghtaling, 7 Cal. 391, in Visser v. Webster, 113.
- Fraudulent Sale*—Taaffe v. Josephson, 7 Cal. 352; Alvarez v. Brannon, 7 Cal. 503, in Seligman v. Kulkman, 215, and Vance v. Boynton, 554, in Whitney v. Stark, 517.
- Homestead*—Sargent v. Wilson, 5 Cal. 504; Morse v. McCarty, 6 Cal. 71; Selover v. American C. Co., 7 Cal. 266, in Revalk v. Kraemer, 71, and Revalk v. Kraemer, 66; Taylor v. Hargous, 4 Cal. 273, in Estate of Buchanan, 509.
- Insolvency*—Adams v. Woods, 152, in Naglee v. Minturn, 544.
- Instructions*—Davin v. Walker, not reported, in People v. Hurley, 392.
- Judgment*—Stearns v. Aguirre, 6 Cal. 176, in Bryan v. Berry, 135, and Whitwell v. Barbier, 7 Cal. 54, in Gray v. Hawes, 568.
- Jurisdiction*—Suydam v. Pitcher, 4 Cal. 250, and Robb v. Robb, 6 Cal. 21, in Shaw v. McGregor, 521.
- Master and Servant*—Ledley v. Hays, 1 Cal. 161, in Goodwin v. Garr, 617.
- Mortgage*—Benham v. Rowe, 2 Cal. 387; Godeffroy v. Caldwell, 2 Cal. 492; Peters v. Jamestown Bridge Co., 5 Cal. 334, and Guy v. Ide, 6 Cal. 99, in Payne v. Bensley, 267.
- Negotiable Instrument*—Fisher v. Dennis, 6 Cal. 577, in Visser v. Webster, 112.
- Office*—People v. Fitch, 1 Cal. 519, in People v. Langdon, 15.
- Pleading*—Dewey v. Bowman, 145, in Thompson v. Lee, 280, and Selkirk v. Sacramento, 3 Cal. 323, and Merced M. Co. v. Fremont, 7 Cal. 317, in Tuol. W. Co. v. Chapman, 397.
- Pledge*—Hyatt v. Argenti, 3 Cal. 151, in Dewey v. Bowman, 150, 151.
- Possession*—Conger v. Weaver, 6 Cal. 548, in Thompson v. Lee, 280; Bird v. Dennison, 7 Cal. 297, in Bryan v. Ramirez, 467.
- Powers*—Posten v. Rasette, 5 Cal. 469, in Marzion v. Pioche, 536.
- Principal and Agent*—Billings v. Morrow, 7 Cal. 171; Sayre v. Nichols, 7 Cal. 535, in Davidson v. Dallas, 247.
- Pueblo Lands*—Leonard v. Darlington, 6 Cal. 123, in Welch v. Sullivan, 201.
- Set-off*—Walker v. Sedgwick, 5 Cal. 192, in Still v. Saunders, 286.
- Tenant in Common*—De Johnson v. Sepulveda, 5 Cal. 149, in Parke v. Kilham, 79.
- Trial*—Smith v. Rowe, 4 Cal. 6, in Still v. Saunders, 286.
- Water Right*—Conger v. Weaver, 6 Cal. 548, in Hill v. King, 338.
- Witness*—Gates v. Nash, 6 Cal. 192; Lucas v. Payne, 7 Cal. 92, in Turner v. McIlhenny, 579.
- Written Instrument*—Grewell v. Henderson, 7 Cal. 290, in Henderson v. Grewell, 534.

CASES COMMENTED ON.

- Contract*—Murdock v. Murdock, 7 Cal. 511, in Swartz v. Hazlett, 123.
- Judgment*—Nickerson v. Chatterton, 7 Cal. 568, in Ginaca v. Atwood, 448.
- New Trial*—Gray v. Eaton, 5 Cal. 443, in Still v. Saunders, 286.
- Office*—People v. Reid, 6 Cal. 283; People v. Mizner, 7 Cal. 519, in People v. Langdon, 11, 15.
- Possession*—Irwin v. Phillips, 5 Cal. 140, in Crandall v. Woods, 141.
- Pueblo Lands*—Clarkson v. Hanks, 3 Cal. 47; Cohas v. Raisin, 3 Cal. 443, in Welch v. Sullivan, 198.
- Statute of Frauds*—Fitzgerald v. Gorham, 4 Cal. 289, in Stewart v. Scannell, 83, and Vance v. Boynton, 561.
- Taxes*—De Witt v. Hays, 2 Cal. 463; Robinson v. Gaar, 6 Cal. 273, in Palmer v. Boling, 338.

CASES DISTINGUISHED.

- Appeal*—Baker v. Rosenthal, not reported, in Gilman v. Contra Costa Co., 57.
- Alcalde Grants*—Leese v. Clark, 3 Cal. 17, in Welch v. Sullivan, 198.

CASES EXPLAINED.

Appeal—Henly v. Hastings, 3 Cal. 341, in *Gilman v. Contra Costa Co.*, 57.
Negotiable Instrument—Wilcombe v. Dodge, 3 Cal. 260, in *McFarland v. Pico*, 634.

CASES OVERRULED.

Alcalde Grants—Woodworth v. Fulton, 1 Cal. 293, in *Welch v. Sullivan*, 187.
Appeal—Dewey v. Bowman, April Term, 1857, in *Garwood v. Sampson*, 108.
Certiorari—People v. Hester, 6 Cal. 579, in *People v. El Dorado Co.*, 61.
Constitutional Law—People v. Whitman, 6 Cal. 659, in *Price v. Whitman*, 415.
Negotiable Instrument—Toothaker v. Cornwall, 4 Cal. 28, in *McFarland v. Price*, 630.

CASE QUALIFIED

Homestead—Taylor v. Hargous, 4 Cal. 373, in *Revalk v. Kraemer*, 73.

CERTIORARI.

1. CERTIORARI, WHEN WILL NOT LIE.—A writ of *certiorari* will lie in the District Court, to review the action of the board of supervisors; otherwise their action would be beyond control. *People v. El Dorado Co.*, 58.
2. SUPERVISORS, POWERS OF.—From the necessity of the case, supervisors exercise judicial, legislative and executive powers, in matters relating to the police and fiscal regulations of counties. *Id.*

CHALLENGES.

See CRIMINAL LAW, 11, 15, 16.

COMMERCE.

See SHIPS, 1.

CONDITIONS PRECEDENT.

See BILLS AND NOTES, 15.

CONGRESS.

See SHIPS.

CONSIDERATION.

See BILLS AND NOTES, 3, 4; CONTRACT, 1, 2; DEED; PARENT AND CHILD, 1, 6

CONSIGNOR AND CONSIGNEE.

1. CONSIGNEE, LIABILITY OF.—The liability of a consignee to his principal, for the proceeds of sales made, accrues, in the absence of original instructions to remit proceeds on sale, on demand, or instructions to remit, and not upon receipt of proceeds by the consignee. *Kane v. Cook*, 449.
2. *IDEM.*—WHEN IT ATTACHES.—And where instructions to remit are originally given, but the consignee forwards no account of sales, the right of action of the principal only accrues upon his knowledge of the sales, and of receipt of the proceeds by the consignee. *Id.*
3. *IDEM.*—Nor does the fact that the principal had, at an earlier period, commenced an action in another State, where he resided, against the consignee to recover the proceeds, averring in his complaint, upon information and belief that a sale had been made, fix that as the time when the liability accrued. *Id.*
4. *IDEM.*—DUTY OF CONSIGNEE.—It was the duty of the consignee not only to inform his principal of the sales, but to remit the proceeds. His neglect not only deprived his principal of his funds, but kept him in ignorance of his rights. *Id.*
5. LIMITATION OF ACTION AGAINST CONSIGNEE.—To hold that the Statute of Limitations ran against the principal under such circumstances, would be to permit the consignee to take advantage of his own wrong, and to sustain a defense, of which, in conscience, he ought not to be permitted to avail himself. *Id.*

6. **STATUTE OF LIMITATIONS, CONSTRUCTION OF.**—Statutes of Limitations are intended to prevent the assertion of stale claims, which it may be difficult, or impossible, to defeat by furnishing the requisite proof, owing to the lapse of time; and also proceeding upon the presumption of payment. They are not intended to protect a party who, by a fraudulent concealment, has delayed the assertion of a right. *Id.*

CONSOLIDATION ACT.

See **SAN FRANCISCO.**

CONSTITUTIONAL LAW.

See **APPEAL, 8; COUNTRY, 4, 6; OFFICE AND OFFICERS, 1-6; REVENUE, 3; SHIPS AND SHIPPING, 1-3; STATUTE, 3-6.**

CONSTRUCTION.

See **BOND, 1, 2, 3; STATUTE, 1, 2,**

CONTINUANCE.

CONTINUANCE—WHAT MUST BE SHOWN.—Affidavits for continuance should show that the facts, expected to be proved by the absent witnesses, cannot otherwise be proved. *People v. Quincy, 89.*

See **PRACTICE, 1.**

CONTRACT AND CONTRACTOR.

1. **CONSIDERATION, SUFFICIENCY OF FOR EXPRESS PROMISE.**—Where an insolvent, after his discharge, expressly promises his creditor to pay his debt, it can be enforced, the debt being a sufficient consideration to support the subsequent promise. *Feeny v. Daly, 84.*
2. **IDEM.**—A verbal promise is sufficient, as our statute has not changed the common law rule. *Id.*
3. **MASTER—WHEN NOT LIABLE FOR NEGLIGENCE OF SERVANT.**—Where parties employed architects, reputed to be skilled in their profession, to construct, at a designated point on a creek, a dam, or embankment, of certain specified dimensions, capable of resisting all floods, and freshets of the stream for the period of two years, and to deliver it completed by a given time; and before the embankment was completed it was broken by a sudden freshet, and a large body of water, confined by it, rushed down the channel of the stream, carrying away and destroying, in its course, the store of plaintiffs, with their stock of merchandise. The employers exercised no supervision, gave no directions, furnished no materials, nor had they accepted the work. Plaintiffs having brought suit to recover the damage sustained by them, against the employers and contractors: *Held*, that the latter alone were liable. *Boswell v. Laird, 469.*
4. **IDEM—RESPONDEAT SUPERIOR, WHEN NOT TO APPLY.**—The relation of the parties is that of independent contractors; the relation of master and servant, or superior and subordinate, did not exist between them, and therefore the doctrine *respondet superior* does not apply to the case. *Id.*
5. **IDEM.—CONTRACTOR'S LIABILITY.**—The architects alone were responsible to third parties, the defective construction which caused the injury not being inherent in the original plan contracted for. If the plan of this work had been devised by the owners, and the builders simply engaged to carry it out, and the defects from which the injuries resulted had been inherent in the plan, then the former would have been liable to plaintiffs. *Id.*
6. **IDEM.**—A person who undertakes the erection of a building, or other work, for his own benefit, is not responsible for injuries to third persons, occasioned by the negligence of a person, or his servants, who are actually engaged in executing the whole work, under an independent contract. *Id.*
7. **IDEM.—RIGHT OF SELECTION NECESSARY TO FIX LIABILITY.**—The right of selection is the basis of the responsibility of a master or principal for the acts of his agent. No one can be held responsible, as principal, who has not the right to choose the agent from whose act the injury flows. *Id.*

8. **MASTER LIABLE AFTER ACCEPTANCE OF WORK.**—After the acceptance of the work, or construction, by the person for whom it was built, he becomes liable for subsequent injuries, having thus assumed the responsibility of its sufficiency; and the liability of the contractors ceases. *Id.*
9. **IDEM.**—Where the enterprise undertaken is a lawful one, and is entrusted to competent and skillful architects, the mere fact that the improvements are erected upon the land of the proprietor is no just reason why liability should attach to him, during its progress, any more than if such enterprise be executed elsewhere. *Id.*
10. **COVENANT, WHEN BINDING.**—Where the defendant being the owner, in whole or in part, of certain steamers, in consideration of a sum of money paid to him, covenanted that he would not run, or suffer to be run, or employed, those steamers on certain waters of the State: *Held*, that he was not released from his covenant by a sale of the steamers, or of his interest therein. *California Steam Nav. Co. v. Wright*, 535.
11. **IDEM.**—A voluntary promise by the holder of defendant's agreement, that he would not assign it, was not binding; and where the contract was in fact made for the benefit of a company in which the obligee held stock, with knowledge of that fact on the part of the defendant, such promise was in fraud of the company's rights, and the defendant could not avail himself of it. *Id.*
12. **IDEM.**—Nor if the fact is that defendant was kept in ignorance by the obligee of the contract, that he was acting for the company, can the defendant avail himself of the fact as a defense, no fraud being alleged, while he retains the consideration paid for his contract. He cannot retain the consideration on the ground of fraud, and resist the payment of the penalty of an infraction of his contract on the same ground. *Id.*

See **LAND**, 26.

CONVERSION.

See **CRIMINAL LAW**, 1.

CONVEYANCE.

See **DEED**; **HOMESTEAD**; **LAND**, 26, 27; **PARENT AND CHILD**, 1-6.

COSTS.

See **APPEAL**, 17.

COUNTY.

1. **COUNTY, LIABILITY OF.**—At common law, an action did not lie against a county; and this was the law of this State, until the 18th of May, 1854. The law passed May 1st, 1854, exempting the property of counties from a forced sale under execution, did not affect the obligation of plaintiff's contract with the county, for it was but an affirmance of the common law. *Gilman v. Contra Costa County*, 52.
2. **IDEM.**—**PROPERTY EXEMPT FROM EXECUTION.**—An execution levy upon a county's revenues in the hands of the treasurer, is illegal and void. *Id.*
3. **COUNTIES AS PARTIES TO ACTION.**—Under the Act of April, 1854, counties have the right of prosecuting and defending actions in the same manner as individuals. *Placer Co. v. Astin*, 303.
4. **COUNTY SEAT, CHANGE OF.**—The Legislature can delegate the power to the voters of a county to select a county seat therein. *Upham v. Supervisors*, 378.
5. **LEGISLATURE CANNOT DELEGATE ITS POWERS.**—The Legislature cannot delegate its general legislative powers, but it can authorize others to do those things which it cannot understandingly or advantageously do itself. *Id.*
6. **IDEM.**—Admitting that the Legislature must directly select the places for holding the District Court, it does not follow that the right to select a county seat may not be conferred by law upon the people, as the Constitution does not require that the District Court shall be held at a county seat. *Id.*

See **REVENUE**; **SUPERVISORS**; **TAXES**.

COUNTY COURT.

APPEAL FROM JUSTICE'S COURT.—On appeal from a Justice's Court to the County Court, on questions of law alone, if a new trial be ordered, it should take place in the County Court. *People v. Freelon*, 517.

COUNTY SEATS.

See COUNTY, 4.

COURT.

See JUDGMENT, 8.

COVENANT.

See CONTRACT, 10; LANDLORD AND TENANT, 2.

CREDITOR.

REPLEVIN, ESTOPPEL OF CLAIMANT.—To estop a party from claiming goods as against the creditor of a third party, it must appear that he stated to the creditor himself that he had sold the article to the third party, and that the creditor parted with some right or advantage, on the faith of the information. *Goodale v. Scannell*, 27.

See ATTACHMENT; PARTNERSHIP, 5-7, 14-16; SALE, 2-4.

CRIMINAL LAW.

1. CONVERSION BY BAILEE.—All conversions of money or property by a bailee, are not "*ipso facto* unlawful, or felonious, under our statute. The word 'bailee,' under our statute, must be construed in a limited sense, as designating 'bailees' to keep, transport and deliver." *People v. Cohen*, 42.
2. IDEM.—INDICTMENTS, WHAT SHOULD SET FORTH.—Indictments under the statute against "bailees" should distinctly set forth the character of the bailment, the mode of conversion, the description of the property, and its value. *Id.*
3. IDEM.—WHEN INSUFFICIENT.—An indictment which charges the defendant with converting moneys, goods, and chattles, of the value of four hundred thousand dollars, without any particular specification of the different articles, is bad. *Id.*
4. MURDER, IN FIRST DEGREE.—On a trial for murder it is not error to instruct the jury that if the killing was the result of deliberation, no matter for how short a period, it would be murder in the first degree, under our statute; where the evidence was sufficient to warrant the jury in finding the fact, that the killing was deliberate and premeditated. *People v. Moore*, 90.
5. IDEM.—MALICE ESSENTIAL.—There can be no murder without malice, either express or implied. *Id.*
6. NEW TRIAL.—INSUFFICIENT GROUNDS.—Where the Court erroneously defined the crime of murder in the first degree, in its charge to the jury, but in a subsequent instruction clearly and correctly defined it, the erroneous ruling is not a sufficient ground for a new trial. *Id.*
7. ERROR IN INSTRUCTIONS.—A mere want of perspicuity in an instruction to a jury, which does not injure the prisoner, if erroneous, is not sufficient ground for a reversal of the judgment. The objection must go to this extent, that the instruction is wholly erroneous, or susceptible of different and doubtful constructions. *Id.*
8. PERJURY, WHAT ESSENTIAL TO.—A conviction for perjury cannot be sustained without the false oath be material to the issue, and, therefore, prejudicial to some one, otherwise, however willful, it cannot be perjury. *People v. McDermott*, 288.
9. CRIMINAL LAW, RIGHT TO SEPARATE TRIAL.—A defendant, in a joint-indictment, has the right to demand a separate trial, or to waive this right, and be tried jointly. *People v. McCulla*, 301.
10. IDEM.—SEVERANCE OF CHALLENGES.—Where several defendants are tried together, they are not allowed to sever their challenges, but all must join therein. This applies as well to peremptory, as to challenges for cause. *Id.*

11. **TRESPASS—FORCE MAY BE USED TO RESIST.**—The owner of property in the possession of the same, has a right to use so much force as is necessary to prevent a forcible trespass. *People v. Payne*, 341.
12. **IDEM.—FORCE REPELLED BY FORCE.**—Where a trespasser goes with the intent and with the means to commit a felony, if necessary to accomplish the end intended, the owner of the property may repel force by force. *Id.*
13. **CRIMINAL PROCEDURE—INSTRUCTIONS TO BE IN WRITING.**—The instructions of the Court must be in writing. They should place the real points arising under the testimony fully before the jury. *Id.*
14. **IDEM.—VERBAL MODIFICATION ERRONEOUS.**—A verbal modification of a written instruction asked, is erroneous. *Id.*
15. **CHALLENGE FOR CAUSE.**—A challenge for cause is warranted where the juror, on his *voir dire*, states that it would require proof to change the opinion then existing in his mind. *People v. Gehr*, 359.
16. **IDEM.**—The fact that the juror says that he could try the cause impartially, will not make him competent. The life or liberty of a citizen is not to be committed to the decision of those whose prejudices and pride of opinion are enlisted against him. *Id.*
17. **INSTRUCTION, WHEN PROPERLY REFUSED.**—An instruction asked for is properly refused when there is no evidence on the question of fact embraced in it. *People v. Hurley*, 390.
18. **HOMICIDE, WHAT NOT SUFFICIENT JUSTIFICATION.**—On a trial for murder, weakness of mind, fear, and excitement, of the defendant, produced by the violence of the deceased, will not justify the homicide. *Id.*
19. **IDEM.**—Nor is an assault and the infliction of great bodily harm upon the defendant by the deceased, a justification, unless it appear that it was necessary to take the life of the deceased to prevent such bodily harm. *Id.*
20. **IDEM.**—The impression of the defendant at the time of the killing, that a great bodily harm was about to be inflicted upon him by the deceased, cannot be submitted to the jury as a justification, if they believe such an impression existed in the defendant's mind. *Id.*
21. **IDEM.**—The impression must have been produced by circumstances sufficient to excite the fears of a reasonable person. *Id.*
22. **IDEM.—WHAT SUFFICIENT JUSTIFICATION.**—If the attempt to inflict bodily injury be made with a deadly weapon, then the reasonable fear and actual belief would justify the killing; but when the attempt does not constitute felony, there must exist the absolute necessity of taking life to prevent the bodily harm, in order to excuse the killing. *Id.*
23. **INSTRUCTIONS, PRACTICE ON GIVING AND REFUSING.**—Where equivalent instructions are given and refused, the Court should place its refusal on the ground that equivalent instructions were given. Unless this is done in the presence of the jury, they may be misled by the refusal. *Id.*
24. **CRIMINAL PRACTICE—ORAL CHARGE, WHEN ERRONEOUS.**—In criminal cases it is error to charge the jury orally, without the consent of parties. *People v. Demint*, 423.
25. **GRAND JURY, HOW LEGALLY CONSTITUTED.**—Where a grand jury consisted of twenty-three persons, nine of whom were challenged for cause by a prisoner, and the charge was sustained by the Court, and nine jurors excluded from the investigation of the case, and an indictment was found by the remaining fourteen: *Held*, that the indictment was found by a legally constituted grand jury. *People v. Butler*, 435.
26. **TRIAL, EXAMINATION OF WITNESSES.**—Where the prosecuting attorney was allowed by the Court to ask a witness on a trial for murder, what was the business of the prisoner, under the objection of the latter, on the ground of irrelevancy: *Held*, that where the record did not contain all the evidence given, the question must be presumed to be relevant, as such might often be proper. *Id.*
27. **IDEM.—ANSWER OF WITNESS CONSTRUED.**—Nor can the answer of the witness that the prisoner was a gambler, be considered as an injury to the prisoner, at a time when gambling was licensed by law. *Id.*
28. **IDEM.—DUTY OF PROSECUTING ATTORNEY.**—Prosecuting attorneys, however, should do their duty faithfully, but no more. They should never act as employed counsel, nor take advantage of temporary public excite-

ment against the prisoner, or of any prejudice against him, arising from any cause whatever. *Id.*

29. **HOMICIDE, WHAT PROVOCATION INSUFFICIENT.**—No words of reproach, how grievous soever, are sufficient provocation to reduce the offense of an intentional homicide with a deadly weapon, from murder to manslaughter. *Id.*
30. **INDICTMENT FOR BURGLARY, WHAT TO SPECIFY.**—An indictment for burglary, charging an intent to steal certain goods, must specify the value of the goods intended to be stolen; as burglary, under our statute, can only be committed with intent to commit a felony. *People v. Murray*, 519.
31. **CRIMINAL TRIAL—EXAMINATION OF PROSECUTING WITNESS.**—In a prosecution for assault with intent to commit murder, where the prosecuting witness was asked, on cross-examination, if he did not, previous to the assault, buy a pistol to use upon the defendant; to which he answered in the affirmative; it was competent for the prosecuting-attorney to ask the witness to state his reasons for so doing; and his answer that he was induced to do so by "what, he was informed by a third person, the defendant had said," was competent to show the motive of the witness. *People v. Shea*, 538.
32. **ASSAULT, WHAT CONSTITUTES.**—The drawing of a pistol on another, accompanied by a threat to use it unless the other immediately leave the spot, is an assault, although the pistol is not pointed at the person threatened. *People v. McMakin*, 547.
33. **IDEM.—INTENT TO COMMIT BODILY INJURY.**—The drawing the weapon, accompanied by a threat to use, is sufficient to justify the jury in finding an intent to commit a bodily injury. *Id.*

See AGENCY, 19-21.

DEBTOR.

See PARTNERSHIP, 14, 15, 16.

DEED.

See ACKNOWLEDGMENT; EVIDENCE, 1; LAND, 26; MORTGAGE, 1-6; PARENT AND CHILD, 1-6; SHERIFF, 1-4.

DELIVERY.

See SALE.

DEPOSITIONS.

See EVIDENCE, 12.

DISCHARGE.

See INSOLVENCY, 3.

DITCHES AND CANALS.

See WATER RIGHT.

DISTRICT COURT.

See COUNTY, 6; INJUNCTION, 1.

DRAFT.

See BILLS AND NOTES.

EJECTMENT.

1. **ESTOPPEL—OBJECTIONS TO DEEDS.**—The objection that the deeds, through which the plaintiff in ejectment derails title, are not properly acknowledged, cannot be maintained by one who has no privity with the plaintiff's grantors. *Welch v. Sullivan*, 165.
2. **EJECTMENT—IMPROVEMENTS, SET-OFF.**—Where the defendant in ejectment occupied and improved the land *bona fide*, under color of title, the improvements erected by him constitute an equitable set-off to the extent of their value, to the damages recovered by the plaintiff for the withholding of possession. *Id.* 511.

See LAND, 15.

EQUITY.

1. APPEAL—REVIEW IN EQUITY CASES.—Chancery cases come before this Court upon the pleadings, testimony, and decree, and we must look to the whole record, and see if there is any error in the final decree. *Stil v. Saunders*, 281.
 2. IDEM.—The verdict of a jury in a chancery case is only advisory to the Chancellor, or this Court. *Id.*
 3. TRIAL OF SPECIAL ISSUES IN CHANCERY CASES.—Special issues, framed by the Court according to the established rules of chancery practice, may be tried by a jury in equity cases. *Breuster v. Bours*, 501.
- See CONTRACT, 12; HOMESTEAD, 15; LAND, 27-36; MORTGAGE, 1-6; NEW TRIAL, 2; SALE, 1.

ERROR.

See AGENCY, 15; APPEAL, 10; CRIMINAL LAW, 7; EXECUTION, 2; JUDGMENT, 11; PRACTICE, 2, 7.

ESTATES OF DECEASED PERSONS.

See ADMINISTRATOR.

ESTOPPEL.

See CREDITOR, 1; EJECTMENT, 1; LAND, 25, 34, 40; LANDLORD AND TENANT, 5; PARTNERSHIP, 1-4; TAXES; WATER RIGHT, 3.

EVIDENCE.

1. SECONDARY EVIDENCE, WHEN ADMISSIBLE.—Secondary evidence of the contents of a deed or grant is admissible where the possession of the original is traced to the possession of a party not in the State. *Gordon v. Searing*, 49.
2. TRIAL—DISCRETIONARY POWERS OF COURT.—The order in which testimony shall be admitted is within the discretionary powers of the Court before whom the case is tried. *Id.*
3. PRESUMPTION OF LIFE, WHEN IT CEASES.—In the case of an absent person, from whom no tidings are received, the presumption of life ceases at the end of seven years. *Ashbury v. Sanders*, 62.
4. IDEM.—To shorten this time, there must be evidence of some specific peril to the life of the individual. *Id.*
5. IDEM.—WHAT INSUFFICIENT.—The fact that a fugitive from justice had not been heard of for sixteen months, and that he was a passenger on a particular vessel bound for a specified port, and that neither the vessel nor crew had ever been heard from, is not sufficient to raise a legal presumption of his death. *Id.*
6. WITNESS, ASSIGNOR INCOMPETENT.—The assignor of a claim is incompetent as a witness in favor of the claim, when his assignee is a formal party to the record, and equally so when the suit is prosecuted for the immediate benefit of his assignee, though not a party. *Adams v. Woods*, 325.
7. WITNESS—VENDOR CANNOT IMPEACH HIS OWN SALE.—As a general rule, the vendor of goods is not a competent witness to impeach the sale made by himself. *Howe v. Scannell*, 325.
8. IDEM.—EXCEPTION TO RULE.—But where evidence is introduced showing a collusion between vendor and purchaser to defraud the creditors of the former, the declarations of the vendor are admissible, and, *a fortiori*, his sworn statement. *Id.*
9. EXCEPTIONS TO EVIDENCE, WHEN TO BE TAKEN.—Objections to evidence must be stated in the Court below; they cannot be taken in this Court for the first time. *Potter v. Carney*, 574.
10. NEW TRIAL, WHEN GRANTED.—Where the evidence is insufficient, a new trial should be granted. *Id.*
11. EVIDENCE—DEFECT OF PROOF, HOW CURED.—Defect of proof may be cured by testimony introduced by the adverse party. *Turner v. McIlhenny*, 575.
12. IDEM.—DEPOSITION, WHEN ADMISSIBLE.—A deposition of one of the de-

defendants, introduced by plaintiff, on trial, may be introduced by the defendants on a new trial. *Id.*

13. **IDEM.—INCOMPETENCY OF WITNESS WAIVED.**—The party who calls on an adverse party to testify, makes him a witness, and waives his incompetency to be heard for himself, or for his co-defendant, or co-plaintiff. *Id.*
- See APPEAL, 15; BILLS AND NOTES, 3, 4; FRAUD, 1-3; CRIMINAL LAW, 26, 27, 31; MORTGAGE, 1, 2; PARENT AND CHILD, 1-6; PARTNERSHIP, 17, 18; PLEADING, 1; POSSESSION, 1; SALE, 1; WATER RIGHT, 10.

EXCEPTION.

See EVIDENCE, 9.

EXECUTION.

1. **EXECUTION—WHEN CANNOT BE SET ASIDE.**—Where third parties have purchased, at an execution sale, it is too late to move to set aside the execution. *Bryan v. Berry*, 130.
 2. **EXECUTION—WRIT OF VENDITIONI EXPOSAS.**—The writ of *venditioni exposas* is a simple order of the Court to sell property already levied on under execution. It confers no power to levy, and a recital in the return that the sheriff had levied and sold by virtue of the writ is an unimportant error, when it appears that the levy had been previously made under execution. *Welch v. Sullivan*, 165.
 3. **IDEM.—SHERIFF'S RETURN.**—A description in a sheriff's return, of city lots, by numbers, referring to the official city map, is sufficient. *Id.*
- See APPEAL, 5; COUNTY, 1, 2; JUDGMENT, 1-3, 10; JUSTICE OF THE PEACE, 1-3; LAND, 8, 13, 14, 17, 29; LANDLORD AND TENANTS, 6, 7; PARTNERSHIP, 1; SHERIFF, 1-4; SHERIFF'S SALE, 1-3.

EXPRESS PROMISE.

See CONTRACT, 2.

FEDERAL COURT.

See INJUNCTION, 3.

FINDING.

1. **FINDINGS, WHEN NOT NECESSARY.**—There is no necessity of a finding as to a fact admitted by the pleadings. A finding is only required when the allegation of a material fact in the complaint is converted by the answer, so as to raise an issue. *Swift v. Muysgridge*, 445.
2. **FINDINGS MUST SUPPORT JUDGMENT.**—The finding of a Court, like a special verdict of a jury, must, taken in connection with the pleadings, support the judgment. *Id.*
3. **FINDINGS, HOW AUTHENTICATED.**—The finding of a Court, like the verdict of a jury, is a matter of record, and copies thereof may be sufficiently authenticated by the certificate of the clerk. *Reynolds v. Harris*, 617.
4. **IDEM.**—It follows that the finding need not be embodied in a statement or bill of exceptions. *Id.*

See NEW TRIAL, 1.

FORCIBLE ENTRY AND UNLAWFUL DETAINER.

1. **STATUTES, HOW CONSTRUED.**—The Statute concerning forcible entry and unlawful detainer must be strictly construed. *House v. Keiser*, 499.
2. **IDEM.—WHAT POSSESSION REQUISITE.**—A mere scrambling or interrupted possession is not sufficient to maintain the action, but it must be actual, peaceable, and exclusive. *Id.*
3. **IDEM.—ACTION, BY WHOM.**—This action can only be maintained by the person ousted; his grantee cannot maintain the action. *Id.*

FORECLOSURE.

See HOMESTEAD, 10; LAND, 28-31; LANDLORD AND TENANT, 6.

FRAUD.

1. FRAUD, FROM WHAT MAY BE INFERRED.—Fraud may consist in the misrepresentation, or the concealment of material facts, and may be inferred from the circumstances and condition of the parties contracting. *Belden v. Henriques*, 87.
 2. IDEM.—WHAT MUST BE PROVED.—In order to sustain the allegations of fraud and deceit in contracting a debt, it is necessary to prove that the representations alleged to have been fraudulent and deceitful were not true. *Id.*
 3. EVIDENCE—DECLARATIONS OF VENDOR.—The declarations and acts of a vendor before sale, are competent testimony to show a fraudulent intent on his part, in a suit to impeach the sale on the ground of fraud. *Visher v. Webster*, 109.
 4. FRAUD, OF PURCHASER VITIATES SALE.—Where a person, clearly insolvent, purchases goods from another on credit, and conceals the fact of his insolvency from the vendor, he is guilty of such fraud as vitiates the sale. *Seligman v. Kalkman*, 207.
 5. IDEM.—REMEDIES.—A party wishing to avoid such sale, on the ground of fraud, has no right to sue upon the contract at the same time. The latter suit may be pleaded in bar to the former. *Id.*
- See AGENCY, 12-21; BILLS AND NOTES, 18, 19; CONTRACT, 11-12; EVIDENCE, 7, 8; HOMESTEAD, 15; LAND, 34-36; PARENT AND CHILD, 1-6; SALE, 2-4.

GRAND JURY.

See CRIMINAL LAW, 25.

HOMESTEAD.

1. HOMESTEAD, WHAT PROPERTY MAY BECOME.—The separate property of the husband acquired before marriage, may become the homestead, as well as the common property of the husband and wife. *Revalk v. Kraemer*, 66.
2. IDEM.—As to the separate property of the wife—*quære*. *Id.*
3. HOMESTEAD, PARTIES NECESSARY IN ACTION FOR.—Where the homestead was claimed by the husband, on an action in which he was alone defendant, to foreclose a mortgage made by him alone, since marriage, neither the rights of the husband or wife could be affected by the proceedings in that case, the wife not being a party. Legal proceedings, to be conclusive against either, must embrace both. *Id.*
4. IDEM.—MORTGAGE BY HUSBAND, WHEN VOID.—A mortgage of a homestead, signed by the husband alone, is absolutely void where its value does not exceed five thousand dollars. When a husband ceases to be the head of a family, the right to a homestead also ceases. *Id.*
5. IDEM.—A mortgage, void because it was upon a homestead, will not become valid, by reason of the homestead right being lost by the death of the wife of the mortgagor without children; the debt which the mortgage was intended to secure, is not impaired, but it is placed on the same level with the other debts of the mortgagor, and must be enforced in the same manner. *Id.*
6. IDEM.—WHO ENTITLED TO RIGHT OF.—Any individual, whether married or not, may be the head of a family, and as such, entitled to a homestead right. *Id.*
7. IDEM.—RIGHT, WHEN LOST.—But when this relation ceases, the right also ceases. *Id.*
8. HOMESTEAD RIGHT, PARTIES TO ACTION ON.—In an action against the husband alone, the homestead-right cannot be determined. Both parties must be before the Court. *Kraemer v. Revalk*, 74.
9. IDEM.—RIGHT OF APPEAL.—The husband has not even the right of appeal in such a case, as the judgment could not affect the question of homestead. *Id.*
10. HOMESTEAD, FORECLOSURE OF MORTGAGE ON.—Where, after judgment of foreclosure had been taken in an action against the husband solely, on a mortgage on the homestead premises, executed by him alone, the husband and wife joined in a mortgage to a third party: *Held*, that the

foreclosure bound no one as to the homestead, and that the second mortgage was absolute as against the homestead. *Van Reynegan v. Revalk*, 76.

11. **IDEM.—EFFECT OF WIFE'S DECEASE.**—The wife's decease before the second mortgage was recorded, does not impair it as against a void mortgage. *Id.*
12. **HOMESTEAD, WHEN SUBJECT TO MORTGAGE.**—Where A. who is a married man, is occupying premises as the tenant of B., and concludes to purchase the same, and to do so borrows the whole of the purchase money from C., and to secure the payment thereof to C., mortgages the premises to him, but the wife does not sign the mortgage: *Held*, that the homestead right was subject to the mortgage. *Lassen v. Vance*, 271.
13. **IDEM.—DEED AND MORTGAGE, WHEN ONE TRANSACTION.**—The deed and mortgage being simultaneous, were but parts of the same transaction. *Id.*
14. **IDEM.**—It would seem, under the circumstances, that neither the husband nor his wife, had either legal or equitable right to the premises. *Id.*
15. **EQUITY—WHEN WILL COMPEL CANCELLATION OF DEED.**—Where husband and wife execute a conveyance of their homestead, which the husband delivers to the purchaser, before the purchase-money therefor is paid, which is afterwards fraudulently attached, in a suit brought by the real, though not the ostensible purchaser, against the husband alone: *Held*, that equity will compel a cancellation of the deed so obtained. *Still v. Saunders*, 281.
16. **HOMESTEAD, NOT AFFECTED BY MORTGAGE OF HUSBAND.**—The homestead right is not affected by the foreclosure of a mortgage signed by the husband alone. *Cook v. Klink*, 347.
17. **IDEM.—RIGHT, WHEN CANNOT BE TRIED.**—The homestead right cannot be tried on a motion to set aside a sale under a mortgage. The husband and wife should have filed a cross bill in the foreclosure suit, or brought an ejectment suit for the property. *Id.*
18. **IDEM.—RIGHT TO BE JOINTLY ASSERTED.**—The homestead right cannot be individually asserted; both parties must join. *Id.*
19. **HOMESTEAD, RIGHT OF SURVIVORSHIP.**—The homestead being held in a sort of joint-tenancy, passes, on the death of the husband, to the wife, by right of survivorship. *Buchanan's Estate*, 507.

HOMICIDE.

See CRIMINAL LAW, 18-22.

HUSBAND AND WIFE.

1. **HUSBAND AND WIFE, COMMON PROPERTY OF.**—Property in this State, acquired by the husband after marriage, but before the passage of the Act of April 17th, 1850, is common property under the Mexican law, as that so acquired subsequently is by the statute, and cannot be disposed of will. *Buchanan's Estate*, 507.
2. **DESCENT, POSTHUMOUS CHILD.**—A posthumous child, for whom no provision is made in the will of the father, is entitled to one half of the separate and common property, where no express intention of the testator to the contrary appears. *Id.*

See HOMESTEAD.

IMPROVEMENTS.

See EJECTMENT, 2.

INDICTMENT.

See CRIMINAL LAW, 2, 3, 25, 30.

INDORSER.

See BILLS AND NOTES.

INJUNCTION.

1. INJUNCTION, NOT TO RESTRAIN COURTS OF CO-ORDINATE JURISDICTION.—One District Court cannot, by injunction, restrain the execution of the orders or decrees of another Court of co-ordinate jurisdiction. *Anthony v. Dunlap*, 26; *Rickett v. Johnson*, 34; *Revalk v. Kraemer*, 66; *Chipman v. Hibbard*, 268.
2. IDEM.—RELIEF, WHERE OBTAINABLE.—The Court in which the objectionable order or decree exists, is the one to apply to for relief. *Rickett v. Johnson*, 34.
3. INJUNCTION, WHEN WILL NOT LIE.—A State Court cannot enjoin the proceedings of a Federal Court. *Phelan v. Smith*, 520.
4. IDEM.—One Court cannot restrain the proceedings of another Court of co-ordinate jurisdiction. *Id.*

See JURISDICTION, 1, 2; WATER RIGHT, 16, 17, 21–24.

INSANE ASYLUM.

See OFFICE AND OFFICER, 2.

INSOLVENCY.

1. INSOLVENT ACT, APPLICATIONS UNDER, VOID.—A joint application of two partners for the benefit of the Insolvent Act is void, there being no authority for such applications in the Act. *Meyer v. Kohlman*, 44.
2. IDEM.—SCHEDULE.—A schedule attached to such a petition, showing a surrender of all the joint property of the partners, is not a compliance with the Act, which requires a surrender of all the property of the insolvent. *Id.*
3. IDEM.—DISCHARGE, WHEN A BAR.—A discharge under the Insolvent Act, to be a bar to actions on indebtedness mentioned in the petitioner's schedule, must be in strict conformity with the various provisions of the law, otherwise it is void. *Id.*

See BILLS AND NOTES, 18; CONTRACT, 1, 2; FRAUD, 4; LAND, 28, 29.

INSTRUCTION.

INSTRUCTIONS, WHEN MAY BE REFUSED.—Instructions to the jury are properly refused when not warranted by the pleadings. *Thompson v. Lee*, 275.

See BILLS AND NOTES, 1, 2; CRIMINAL LAW, 4, 6, 7, 13, 14, 17, 23, 24; PRACTICE, 2.

INTENDMENT.

APPEAL, LEGAL INTENDMENTS ON.—In the absence of testimony taken in the case, every legal intendment is in favor of the action of a Court of Record. *People v. Quincy*, 89.

INTEREST.

See BILLS AND NOTES, 9–11; JUDGMENT, 4.

ISSUES.

See EQUITY, 3; MALICIOUS PROSECUTION, 3.

JOINT TENANT.

See HOMESTEAD, 19.

JUDGMENT.

1. EXECUTION LEVY A SATISFACTION OF JUDGMENT.—A levy under execution, on sufficient property to satisfy it, is a satisfaction of the judgment. *People v. Chisholm*, 29.
2. IDEM.—SATISFACTION OF MORTGAGE.—Where a judgment is rendered against A. and his sureties, and A. and a portion of his sureties, in order to secure the payment of said judgment, mortgage their property, subsequent to which an execution under the judgment is levied upon sufficient property of B., a surety not joining in the mortgage, to satisfy the

- judgment, and afterwards is voluntarily released: *Held*, that no action can be maintained on the mortgage, for the levy satisfying the judgment, the mortgage, as an incident thereto, must also be thereby satisfied. *Id.*
3. **IDEM.—OBLIGATION NOT REVIVED BY RELEASE OF PROPERTY.**—The voluntary release of the property levied on by the plaintiff in execution, could not revive the obligation on the mortgage given to secure the judgment. *Id.*
 4. **JUDGMENT, INTEREST ON.**—A judgment rendered for use and occupation should not draw any interest whatever. *Osborn v. Hendrickson*, 31.
 5. **JUDGMENT, ON CONSTRUCTIVE SERVICE OF PROCESS.**—A judgment obtained by publication of summons against a defendant then out of the State in which the judgment is rendered, though it may be enforced against his property in that State, has no binding force in *personam*, and is a mere nullity when attempted to be enforced in another State. *Kane v. Cook*, 449.
 6. **IDEM.—HOW FAR INEFFECTUAL.**—As a recovery cannot be had upon such a judgment in another State, it is equally unavailing when offered in support of a plea of former recovery in an action upon the original demand. *Id.*
 7. **IDEM.—VALIDITY, ON WHAT DEPENDS.**—To hold otherwise would be to hold that the validity of the judgment depends not upon the jurisdiction of the Court, but upon the manner in which it is pleaded. *Id.*
 8. **COURTS, EFFECT OF ADJOURNMENT ON POWERS OF.**—After the adjournment of the term, a Court loses all control over its judgments, unless its jurisdiction is saved by some motion or proceeding at the time. *Shaw v. McGregor*, 521.
 9. **JUDGMENT, WHEN MAY BE SET ASIDE.**—The only exception is when service of summons has not been made, in which case the party against whom it is entered, may move to set it aside. *Id.*
 10. **EXECUTION SALE UNDER VOID JUDGMENT.**—A sale under a void judgment passes no title. If the judgment is merely voidable, the sale is good. *Gray v. Hawes*, 562.
 11. **APPEARANCE, ERRORS NOT CURED BY.**—A judgment, void for want of personal jurisdiction, is not cured by the appearance of the party for the purpose of vacating it. *Id.*
 12. **JUDGMENT, JURISDICTION TO SUSTAIN.**—To sustain a personal judgment, the Court must have jurisdiction of the subject-matter, and of the person. *Id.*
 13. **JURISDICTION NOT CONFERRED BY CONSENT.**—Where the jurisdiction of the Court, as to the subject-matter, has been limited by the Constitution or by statute, the consent of parties cannot confer jurisdiction. *Id.*
 14. **IDEM.**—But when the limit regards certain persons, they may, if competent, waive their privilege and this will give the Court jurisdiction. *Id.*
 15. **JUDGMENT, EFFECT OF WANT OF JURISDICTION.**—The presumption in favor of the judgment of a Court of general jurisdiction, is overthrown when the record of the entire case discloses a want of jurisdiction. *Id.*
- See ATTACHMENT, 5; JURISDICTION, 3; JUSTICE OF THE PEACE, 1-3. SHERIFF'S SALE, 4.

JUDICIAL SALE.

See SHERIFF'S SALE.

JURISDICTION.

1. **INJUNCTION, NOT TO RESTRAIN CO-ORDINATE TRIBUNALS.**—Courts have on power to interfere with the judgments and decrees of other Courts of concurrent jurisdiction. *Anthony v. Dunlap*, 26.
2. **IDEM.—WHEN ALLOWED.**—The only case in which it will be allowed, is where the Court in which the action is pending, is unable by reason of its jurisdiction, to afford the relief sought. *Id.*
3. **JUDGMENT BY CONFESSION, WHEN VOID.**—Judgment, by consent or confession, for over two hundred dollars, in a Justice's Court, is void. Con-

sent of parties cannot give jurisdiction which the Constitution denies. *Feillett v. Engler*, 76.

See INJUNCTION, 1-4; JUDGMENT, 5-15.

JUROR AND JURY.

See INSTRUCTIONS; CRIMINAL LAW, 15, 16; EQUITY, 2, 3.

JUSTICE OF THE PEACE.

1. EXECUTION, WITHIN WHAT TIME TO ISSUE.—An execution can only be issued upon a judgment obtained before a justice of the peace within five years after the entry of the judgment. In contemplation of the statute, there is no judgment after that time. *White v. Clark*, 512
2. IDEM.—STATUTE CONSTRUED.—Section two hundred and fourteen of the Practice Act applies only to judgments of Courts of record. *Id.*
3. IDEM.—LOSS OF DOCKET.—The loss of the docket of the justice will not prevent the statute from running. *Id.*

See COUNTY COURT; JURISDICTION, 3.

LAND.

1. PUEBLO LANDS.—Under the laws of the Indies, whenever a pueblo was formed by a grant to a founder, or the union of ten or more families, or the foundation of a presidio, or the secularization of a mission, each pueblo was entitled in property to certain tracts of land within the limits of the town to be set apart by them, called commons, pasture-grounds and municipal lands, by virtue of their organization as pueblos. *Welch v. Sullivan*, 165.
2. IDEM.—The republic of Mexico, after the revolution of 1824, fully recognized the rights of the towns in their commons, pastures and municipal lands. *Id.*
3. IDEM.—Whether the Mexican Government retained any power to make grants within the limits of a pueblo, or not, the right of the pueblo to have the municipal and common lands assigned, was an acknowledged equity, charged with which the United States Government succeeded to the fee. *Id.*
4. IDEM.—CONGRESSIONAL GRANTS.—The Act of Congress of 1851, operates as a grant to the pueblos of all lands within their limits, vacant and ungranted, on the 7th of July, 1846. *Id.*
5. IDEM.—Such a confirmation is higher evidence of title than a patent, because it is a direct grant of the fee, by the sovereign, through the legislative department, while a patent is only a ministerial act. *Id.*
6. PUEBLO—RIGHT TO DISPOSE OF LANDS.—The pueblos, under the laws of Spain and Mexico, had the right to dispose of certain lands within their limits, to defray municipal expenses. *Id.*
7. ALCALDE GRANTS, VALIDITY OF.—The municipal law remained unchanged after the conquest, until 1850, and grants of pueblo lands by American alcaldes, were grants by the pueblo of its own property, which it had a right to transfer. *Id.*
8. IDEM.—EXECUTION, LANDS LIABLE TO.—Whether the municipal lands of a pueblo could be sold at forced sale, or not, under Mexican law, the Act of Congress of 1851 creates a new tenure, and operates a confirmation of the fee in the town or city, and by the adoption of the common law, in 1850, its lands became liable to execution-sale. *Id.*
9. SAN FRANCISCO AS A PUEBLO.—The place called Punta Yerba Buena, on which the city of San Francisco now stands, seems never to have been a pueblo separately from the presidio, which was founded in 1776. *Id.*
10. IDEM.—GRANT TO CITY OF VACANT LANDS.—The Act of Congress of 1851, operates as a grant to the city of San Francisco of all the vacant lands within her limits, and the confirmation of the U. S. Land Commission is final as to the boundaries therein laid down, the appeal therefrom having been dismissed. *Id.*
11. GRANT, TITLE.—Persons who now contest a grant by competent authority within the city limits, must rely on a sufficient title, issued by competent authority, prior to July 7, 1846. *Id.*

12. **ALCALDE, POWER TO MAKE GRANTS.**—Under the laws of Mexico, and the decrees of the Departmental Assembly of California, the ayuntamiento and the alcaldes had power to grant limited portions of the municipal lands of the pueblo. The American alcaldes, appointed after the conquest, had the same authority, as the municipal law remained unchanged until 1850. *Id.*
13. **EXECUTION, SALE OF PUEBLO LANDS.**—Whether under the Mexican law the municipal lands of the pueblo could be sold at forced sale or not, the Act of Congress of 1851, vested the city with the fee of the land, and by the common law, adopted 1850, it became liable to execution-sale. *Id.*
14. **IDEM.**—A sale of the municipal land of the city in January and February, 1832, on an execution issued under a judgment against the city, rendered September 18, 1851, conveyed a legal title to the land, upon which ejectment can be maintained. *Id.*
15. **EJECTMENT, OUTSTANDING TITLE AS A DEFENSE.**—An outstanding title in a third person will defeat plaintiff's recovery in ejectment, although the defendant does not connect himself with it. *Id.*
16. **IDEM.—SET-OFF.**—The value of improvements on land may be set-off against the rents and profits thereof. *Id.*
17. **EXECUTION, SHERIFF'S SALE.**—*Per Burnett, J.*—The Act of Congress of 1851, vested the title of the ungranted lands within the city limits, in the city of San Francisco, and a sheriff's sale in 1852, under a judgment against the city, entered in September, 1851, passed the title of the city in the purchaser. *Id.*
18. **STARE DECISIS.**—*Per Terry, J.*—Considerations of public policy and justice, as well as regard for individual rights acquired under the law, as announced by the highest judicial tribunal, imperatively demand a strict adherence to the doctrines of the case of *Cohas v. Raisin*. *Id.*
19. **ALCALDE GRANTS, WHEN VOID.**—Alcalde grants of beach and water-lots in San Francisco, not recorded on or before the 3d of April, 1850, in some book of record, in the possession and under the control of the recorder of San Francisco, are void. *Chapin v. Bourne*, 294.
20. **STATE LANDS, WATER-PROPERTY.**—On the formation of this State, the title to water-property passed to this State. *Id.*
21. **SAN FRANCISCO BEACH AND WATER-LOT ACT.**—The Act of the 26th of March, 1851, granted to the city of San Francisco, certain beach and water-lot property in San Francisco, for ninety-nine years. The sale to defendant of a portion thereof, by the State Board of Land Commissioners, under the act of May 18, 1853, passed nothing but the State reversionary interest. *Id.*
22. **IDEM—NOT AFFECTED BY ALCALDE GRANTS.**—The Leavenworth alcalde grants could not pass title, or affect the beach and water-lot property of San Francisco, except as far as conceded by the Act of March 26, 1851, and upon a compliance with the requisitions thereof. *Id.*
23. **TAXATION—ASSESSMENT, SUFFICIENCY OF.**—Where a claim to a tract of land under a Mexican grant, somewhere within a certain larger tract, was ascertained, and the land segregated by a survey, under a decree of confirmation by the U. S. Supreme Court: *Held*, that the land became immediately taxable, and that an assessment thereof will be presumed to have been made after the Survey, where the time allowed by law for the assessment extended to a day four days after the survey. *Palmer v. Boling*, 384.
24. **IDEM.—PRESUMPTIONS OF REGULARITY.**—The acts of the officer making the assessment must be presumed to be in conformity with law, until the contrary is shown. *Id.*
25. **ESTOPPEL—GRANTOR AND GRANTEE.**—A party entering into the possession of the land of another, and in subordination to his title, is estopped from denying his grantor's title. *Walker v. Sedgwick*, 398.
26. **CONTRACT RESCISSION OF.**—When a purchaser of land does not obtain the title which the deed purported to convey, and the covenants embrace, and he goes into and retains possession under the deed; and the failure of the title goes to the entire consideration paid, or to be paid, for the land, then he must seek his remedy by a rescission of the contract, alleging a paramount title in another, and offering to re-deliver possession, and account for the rents and profits. *Id.*

27. VENDOR'S LIEN—NOT LOST BY TAKING NOTES.—The vendor's lien on the land conveyed is not lost by his taking the notes of the purchaser for the purchase-money. And the lien equally exists, whether the instrument amounts to a conveyance, or merely to an executory contract. *Id.*
28. IDEM.—ENFORCEMENT OF.—In a bill in equity to enforce the lien, it is not necessary to allege the issuance of execution, under a judgment at law, previously obtained by the vendor against the purchaser for the amount due, and return of *nulla bona* to sustain the allegation of insolvency. *Id.*
29. EXECUTION—RETURN OF NULLA BONA.—Return of *nulla bona* on an execution is only one mode of proving insolvency. Any other competent proof would be sufficient. *Id.*
30. REMEDIES, LEGAL AND EQUITABLE, UNITED.—Where a vendor of land has taken the notes of the purchaser in payment, and brings his action thereon at law, he should, in that action, if at all, unite his equitable claim for a foreclosure of his lien—the same tribunal administering both law and equity. *Id.*
31. IDEM.—But in a case where the party brought his separate actions, first at law on the notes, and then in equity for a foreclosure, before the adoption of this rule: *Held*, that he be allowed both his legal and equitable remedies, on payment of the costs of the latter suit. *Id.*
32. IDEM.—OFFSET, WHEN MAY BE PLEADED.—And if the defendant has a legal offset to the notes: *Held*, that he may plead it in the latter suit. *Id.*
33. IDEM.—QUESTIONS OF LAW AND EQUITY COMBINED.—The objection that the proceedings may become too complex by permitting different questions of law and equity to be settled in one suit, is not sufficiently strong to overcome the plain provisions of the statute, and the substantial dictates of justice. *Id.*
34. ESTOPPEL BY SILENCE.—When a person knowingly, though passively, looks on and suffers another to purchase and expend money on land under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to assert his legal right against such person. *Bryan v. Ramirez*, 461.
35. POSSESSION AS NOTICE OF EQUITABLE TITLE.—And a purchaser of the legal title has notice of the equity of another in possession. *Id.*
36. IDEM.—And where six persons held in common the legal title, one of whom was present and remained silent when the holder of the equity purchased, under the opinion that he was obtaining the title: *Held*, that the one sixth of the legal title, in the hands of subsequent purchasers, was subject to that equity coupled with possession prior to their purchase. *Id.*
37. SAN FRANCISCO—TITLE TO LANDS.—The confirmation of the title of the city of San Francisco, by the Board of United States Land Commissioners, and the dismissal of the appeal by the Attorney-General, have settled that no title to lands, within the limits of that city, can hereafter be acquired from the United States. *Norton v. Hyatt*, 539.
38. IDEM.—FROM WHOM DERIVED.—It follows, that any title accruing to individuals, since July 7, 1846, must have been derived from the local authorities of the city. *Id.*
39. IDEM.—RESTRICTION AS TO GRANTS.—The regulation forbidding grants to be made within two hundred varas of the water-line of the bay, had reference only to a portion of the present city front. *Id.*
40. POSSESSION, ENTRY INTO.—Parties having the title, and the present right of possession, can always enter peaceably into the possession of premises, and cannot be held liable for so doing, in trespass or ejectment. If he uses force, the remedy is by forcible entry and detainer. *Henderson v. Grewell*, 581.
41. IDEM.—The plaintiff having entered into possession under S. M. H., and in subordination to his title, cannot question S. M. H.'s right to execute the mortgage or agreement, which conferred the right of re-entry upon defendant. *Id.*

See DEED; HOMESTEAD; HUSBAND AND WIFE; SHERIFF, 1-4; WATER RIGHT, 6-9.

LANDLORD AND TENANT.

1. LANDLORD AND TENANT—TENANTS, WHEN MAY REMOVE BUILDINGS.—Tenants have a right to remove buildings erected by them, at any time before the expiration of their leases. *Whipley v. Dewey*, 36.
2. IDEM.—WHEN MAY NOT.—Tenants have no right to remove buildings erected by them, after a forfeiture, or re-entry, for covenant broken. *Id.*
3. IDEM.—SURRENDER OR FORFEITURE, EFFECT OF.—Where a landlord agreed to allow his tenant a reasonable time, after the expiration of his lease, to remove his buildings, and the tenant surrendered or forfeited his lease before the expiration thereof, the intention of the parties must be confined to its legal expiration, and not to the wrongful act of the lessee, in terminating it, and the lessee can claim no rights under the contract. *Id.*
4. IDEM.—There is no moral obligation, under such circumstances, sufficient, as a consideration, to support a subsequent promise of the landlord, to allow the tenant to remove his buildings. *Id.*
5. LANDLORD, TITLE OF, WHEN MAY BE DENIED BY TENANT.—A tenant may show that his landlord's title has terminated, or that his attornment was made under mistake of fact, or by fraud. *McDevitt v. Sullivan*, 592.
6. FORECLOSURE SALE—RIGHTS OF PURCHASER.—Where the owner of mortgaged premises leases the same for a term of years, and the rent is paid in advance by the tenant: *Held*, that the purchaser, under the mortgage-sale can require the tenant to pay the rent over again to him. *Id.*
7. IDEM.—RIGHT TO RENTS.—After sale, and before the term of redemption has expired, the purchaser is entitled to collect the rents. *Id.*
8. IDEM.—DUTY OF TENANT.—Where a tenant finds that there are adverse claimants to the property, he should file a bill of interpleader, making all the adverse claimants parties thereto, and offer to pay the rents into Court, to abide the ultimate decision of the case. *Id.*

LEASE.

See LANDLORD AND TENANT; PLEDGE, 1.

LEGISLATURE.

See APPEAL, 8; COUNTY, 4-6; OFFICE AND OFFICER, 3, 6; REVENUE, 3.

LEVY.

See COUNTY, 2; EXECUTION.

LIEN.

See LAND, 27-33; MECHANICS' LIEN; MINING CLAIM, 1, 2; VESSELS, 1, 2.

LIMITATIONS.

See CONSIGNOR AND CONSIGNEE, 5.

MALICE.

See CRIMINAL LAW, 5; MALICIOUS PROSECUTION.

MALICIOUS PROSECUTION.

1. MALICIOUS PROSECUTION—PROTECTION FROM CIVIL LIABILITY.—Public policy and security require that prosecutors should be protected by the law for the civil liabilities, except in those cases where the two elements of malice in the prosecutor, and want of probable cause for the prosecution, both occur. *Potter v. Seale*, 217.
2. IDEM.—WHEN ACTION FAILS.—Though malice be proved, yet if there was probable cause, the action must fail. *Id.*
3. IDEM.—PROBABLE CAUSE DEFINED.—The question of malice is one for the jury to decide. Probable cause is a mixed question of law and fact. The latter may be defined as a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true. *Id.*
4. IDEM.—DEFENSE IN ACTION.—Where the defendant has fully and fairly

laid his case before counsel, and acts by advice thereof, it is a good defense to the action, though, the question whether the defendant acted *bona fide* under such advice, is a question of intention to be determined by the jury. *Id.*

MASTER AND SERVANT.

See CONTRACT; MINING CLAIM, 1, 2.

MECHANICS' LIEN.

1. **MECHANICS' LIEN—NOTICE INSUFFICIENT.**—The following notice of mechanics' lien does not contain such a description of the premises as the statute contemplates: "A dwelling-house, lately erected by me, for J. W. Conner, situated on Bryant street, between Second and Third streets, in the city of San Francisco, on lot No. —." *Montrose v. Conner*, 344.
2. **IDEM.**—The fact that Conner owned no other building on that street, would not cure the defect. *Id.*

MEXICAN LAW.

See HUSBAND AND WIFE, 1; LAND.

MINING CLAIM.

1. **MINING CLAIM—TITLE OF PURCHASER.**—Where the owner of a mining claim contracts, verbally, with J., for the working thereof, and agrees to pay him a certain sum out of the proceeds of the mine, and J. goes into possession thereof, and while he is working it the owner sells it to a third party, who takes without notice of J.'s contract: *Held*, that his claim is not subject or liable to J.'s contract. *Jenkins v. Redding*, 598.
2. **IDEM.—POSSESSION BY EMPLOYEE.**—The possession of J. being that of his employer, was not notice to the purchaser. *Id.*

See WATER RIGHT.

MORTGAGE.

1. **DEED AS MORTGAGE—PAROL EVIDENCE, WHEN NOT ADMISSIBLE.**—Where the plaintiff filed a bill in equity, setting forth that he held a deed of land, absolute on its face, from the defendant, but averring that it was in fact a mortgage, made to secure a loan payable in six months, with interest: *Held*, that he could not introduce parol evidence to prove that the deed was only intended as a mortgage. *Lee v. Evans*, 424.
2. **IDEM.**—Except in cases of fraud or mistake, it is no more competent to prove by parol that a conditional deed was intended as a mortgage, than that a mortgage was intended as a conditional deed. *Id.*
3. **ANSWER, ADMISSIONS BY FAILURE TO DENY.**—Where the answer, while averring that the deed was a conditional deed, admits that the money was received by defendant, on the understanding that if the money was repaid in six months, with interest, plaintiff was to re-convey, and does not specifically deny that the money was loaned: *Held*, that it virtually admitted the loan. *Id.*
4. **MORTGAGE, FORM OF.**—The allegation in the answer that unless the money was returned, the property should remain in the plaintiff, does not change the nature of the contract. This is the usual form of a mortgage. *Id.*
5. **IDEM.**—If a mortgage at the beginning, the instrument always remains a mortgage. *Id.*
6. **ADMISSIONS, EFFECT OF.**—The intent of the statute is fully carried out by excluding parol testimony; but where parties admit the real facts of the transaction in their pleadings, those admissions are to be taken as modifications of the instrument. *Id.*

See HOMESTEAD, 4, 5, 10-13, 16; JUDGMENT, 1-3; LANDLORD AND TENANT, 6-8; SHIPS AND SHIPPING, 1-3.

MURDER.

See CRIMINAL LAW.

NAVIGATION.

See CONTRACT, 10-12.

NEGLIGENCE.

See CONTRACT, 3.

NEW TRIAL.

1. FINDINGS NOT REVIEWABLE, EXCEPT ON MOTION FOR NEW TRIAL.—The party in whose favor a judgment is rendered on a special verdict, must move for a new trial if he is not satisfied with the verdict, as the latter must otherwise be conclusive upon the facts in the appellate Court. *Garwood v. Simpson*, 101.
 2. APPEAL—FINDINGS, WHEN CONCLUSIVE.—In equity cases, although no motion for a new trial is made, this Court will not hold the findings of fact by the Court below conclusive. *Dewey v. Bowman*, 145.
 3. NEW TRIAL, WHEN AWARDED.—Where the verdict of the jury is clearly against the evidence, a new trial will be awarded. *Bagley v. Eaton*, 159.
 4. NEW TRIAL, WHEN MAY BE REFUSED.—Where the successful party consents to a proper reduction of his judgment, it is not error to refuse a new trial. *Chapin v. Bourne*, 294.
 5. NEW TRIAL—MOTION, HOW WAIVED.—A notice of motion for a new trial, unaccompanied by the affidavit required by statute, will not entitle the statement of the grounds of the motion to be considered on appeal. *Adams v. City of Oakland*, 510.
- See APPEAL, 16, 17; COUNTY COURT, 1; CRIMINAL LAW, 6; EVIDENCE, 10.

NON-JOINDER.

See PARTIES, 1, 2, 3.

NONSUIT.

See REPLEVIN, 3.

NOTARY.

See BILLS AND NOTES, 27.

NOTICE.

See BILLS AND NOTES, 24; MECHANICS' LIEN; WATER RIGHT, 11.

NUISANCE.

See WATER RIGHT, 1, 4, 5, 18.

OFFICE AND OFFICER.

1. OFFICE—POWER TO FILL VACANCY.—Power to fill vacancy, and power to fill an office, are distinct and substantial in their nature. *People ex rel. Aylett v. Langdon*, 1.
2. *IDEM.*—ACT RELATING TO INSANE ASYLUM CONSTRUED.—The twelfth section of the Act concerning the insane asylum, was not designed to apply to the unexpired term of office, but to the unexpired term of the officer, and makes no provision for a vacancy created by the failure of the Legislature to elect on the expiration of the term of the incumbent. *Id.*
3. *IDEM.*—POWER OF GOVERNOR TO FILL VACANCY.—Power of the Governor to fill such vacancy in the office, is not derived from the statute, but from article five, section eight, of the Constitution, and that the appointee of the Executive would only hold until an election by the next Legislature. *Id.*
4. *IDEM.*—TERM OF OFFICE.—The term of the office of the resident-physician of the asylum never runs apart from the officer, and commences running only from the date of his election, the Act only fixing the duration of his term, but not the exact time of its commencement. *Id.*
5. *IDEM.*—VACANCY.—The vacancy referred to in the Act, is a vacancy occurring by death, or otherwise, in the term of a particular officer, which the Governor has the right to fill for the remainder of his unexpired term. *Id.*

6. **IDEM.—POWER TO APPOINT, WHERE VESTED.**—Power to appoint for the full term of the office is vested in the Legislature, and the Governor has no right to exercise it. *Id.*
7. **OFFICERS OF DEPARTMENTS.**—The clerks of the different departments are officers within the meaning of section six of the Act of April 21, 1856, reducing the salaries of officers, etc. *Vaughn v. English*, 39.
See **ACKNOWLEDGMENT**, 1. 2.

ORDER.See **APPEAL**, 2; **EXECUTION**, 2**PARENT AND CHILD.**

1. **PARENT AND CHILD—DEED OF PARENT, WHEN VOID.**—Where a parent executes to his infant son a conveyance of property in consideration of services performed, it must be considered as a voluntary conveyance without legal consideration, as he is not legally bound to pay for his son's services. Such a deed is therefore void against the creditors of the parent, if made when his remaining property is insufficient to pay his debts. *Swartz, Adm'r. v. Haslett*, 118.
2. **DEED AVOIDED BY FRAUD.**—Proof of fraudulent intent on the part of the donor is sufficient to avoid the deed, as against an innocent donee. *Id.*
3. **FRAUDULENT INTENT—IMPLICATIONS.**—In determining the question of fraudulent intent of the donor, he must be considered as knowing the law and the state of his own affairs. *Id.*
4. **FRAUDULENT DEED VOID.**—Where A., by a joint deed grants to his son and H. certain premises, for which H. pays a valuable consideration, and the son pays nothing, and the fact of this want of consideration on the part of the son, is known to H., the fraud in part of the conveyance makes it wholly void, as against the creditors of A. at the date of the deed. *Id.*
5. **IDEM.**—If the co-grantee, with the son, was ignorant of the partial want of consideration, whether the deed would be good as to him—*quære*. *Id.*

PARTIES.

1. **PARTIES, WHO TO JOIN.**—All the parties in interest should join in an action of trover. *Whitney v. Stark*, 514.
 2. **PLEADING, ABATEMENT.**—A failure to join, may be pleaded in abatement. *Id.*
 3. **IDEM.—EFFECT OF FAILURE OF PLEA.**—Where a part-owner sues, *ex delicto*, and the objection of defect of parties is not set up in the answer, the damages should be apportioned at the trial. *Id.*
- See **APPEAL**, 11, 12; **FORCEFUL ENTRY AND DETAINER**, 3; **HOMESTEAD**, 3, 8, 18; **LANDLORD AND TENANT**, 8.

PARTNERSHIP.

1. **PARTNERSHIP, LIABILITY OF.**—Where an individual, doing business under the firm name of "D. W. & Co.," incurred obligations for professional services to the plaintiff, an attorney, and pending the litigation of his matters, formed a partnership with two others, under the same firm name, and one of the new members of the firm thus formed, subsequently dismissed the suit in the firm name, and when payment for the services was demanded, did not deny the liability of the firm, but refused payment and disputed the amount charged: *Held*, that the firm was estopped from denying their liability. *Burritt v. Dickson*, 113.
2. **IDEM.**—Though the plaintiff in such a case knew at the time he commenced suit for the original parties, that he alone composed the firm, yet if he do not appear to have known on what terms the new firm was formed, he could only be guided by the acts and statements of the new firm. *Id.*
3. **IDEM.—PARTIES DEALING WITH FIRM.**—But where it was shown that the plaintiff's partner had drawn up the partnership articles of defendants: *Held*, that plaintiff was bound to know the terms on which the

- defendants' firm was formed, and that defendants had a right to presume such knowledge, and are not estopped by the acts above recited from denying their liability. *Id.*
4. **ESTOPPEL, WHEN MAY BE URGED.**—Before a party can urge an estoppel against another, he must be misled by the conduct of the other, as to facts known to the latter. *Id.*
 5. **PARTNERSHIP, RIGHTS OF FIRM CREDITORS.**—Creditors of a firm can pursue their remedy at law, after a bill for a dissolution is filed by one of the partners, and before a decree of dissolution; any other rule would permit the partners indefinitely to postpone the payment of their debts. *Adams v. Woods*, 152.
 6. **IDEM.**—Creditors can attack the whole proceedings at any time before the distribution of the assets, on the ground that it was instituted to delay, hinder, and defraud creditors. *Id.*
 7. **IDEM.**—A bill for a dissolution and the appointment of a receiver, cannot operate as an assignment for the benefit of creditors, so as to prevent a creditor from acquiring a legal priority, because all such assignments, except in insolvency, are void under the statute. *Id.*
 8. **RECEIVER, MONEY IN HANDS OF.**—A receiver is appointed in behalf of all the parties who may establish rights in the cause, and the money in his hands is in *custodia legis*. *Adams v. Woods*, 306.
 9. **IDEM.—APPOINTMENT OF.**—In a suit for a dissolution of partnership, the appointment of a receiver is only a means to attain the end contemplated by the plaintiff; and so is the employment of counsel by the receiver. *Id.*
 10. **PLEADING, CONSTRUCTION OF.**—If the complaint contemplated a certain end, it equally intended the use of all the necessary means. *Id.*
 11. **RECEIVER, RIGHTS OF.**—A receiver having the right to stipulate with the counsel employed by him, that the counsel shall rely upon the allowance made by the Court for his services, it is the duty of the receiver to report, among his disbursements, the claim of the counsel, leaving the amount to be fixed by the Court; and if the counsel, or any other person employed by the receiver, feels aggrieved by the order of the Court thereon, he can appeal therefrom. *Id.*
 12. **IDEM.**—In such a case, it would only be necessary for the Court below to order the receiver to retain the amount of the disputed items; and the interest of all parties concerned is better subserved by a single appeal upon the entire allowance. *Id.*
 13. **ATTORNEY AND COUNSEL, COMPENSATION.**—Counsel for the plaintiff, in a suit for a dissolution, cannot claim compensation as associate counsel for the receiver. *Id.*
 14. **PARTNERSHIP DISSOLUTION—RIGHTS OF CREDITORS.**—Pending proceedings for a dissolution between partners, and until a dissolution is finally declared, and a receiver appointed to make a *pro rata* distribution among creditors, the latter are not prevented from resorting to adverse proceedings; and when a creditor does so, he may gain a preference over other creditors. *Naglee v. Minturn*, 540.
 15. **IDEM.—PAYMENT BY DEBTOR.**—Therefore a debtor of the partnership is justified in payment to the sheriff, on an execution held by such a creditor. *Id.*
 16. **IDEM.—CROSS-DEMANDS OF DEBTOR.**—From the same principle it follows, that the debtor has a right to purchase cross-demands against the partnership, and to set them up as a defense to the debt due by him to the partnership. *Id.*
 17. **PARTNERSHIP, EVIDENCE OF, COMMON REPORT.**—In an action against a partnership, and in order to prove that one of the defendants was a partner, it is incompetent to ask a witness whether, from what he saw, while working for the firm, and from the acts of the particular defendant during that time, he was a partner. It does not amount even to evidence of common report. *Turner v. McIlhenny*, 575.
 18. **IDEM.—WHEN ADMISSIBLE.**—Common report can only be admissible to prove a partnership, first in corroboration; and, second, to prove knowledge of it on the part of the plaintiff. *Id.*

PAYMENT.

See **BILLS AND NOTES**, 19, 22.

PERJURY.

See **BILLS AND NOTES**, 13, 14; **CRIMINAL LAW**, 8.

PERSONAL PROPERTY.

See **POSSESSION**, 1.

PLEADING.

1. **EVIDENCE—BURDEN OF PROOF.**—The failure of a defendant to deny the charges in a complaint, making out a *prima facie* case for the plaintiff, will throw the *onus* on defendant of proving his affirmative allegations. *Thompson v. Lee*, 275.
 2. **PLEADING—COMPLAINT FOR DIVERSION OF WATER.**—A complaint alleging that plaintiffs are the owners, and in possession of certain mining claims on a certain stream, and are entitled to the natural flow of the waters of the stream, which had been diverted to their injury by defendants, sets forth a sufficient cause of action. *Leigh Co. v. Ind. Ditch Company*, 323.
 3. **IDEM.**—It is not necessary that the complaint should further allege an appropriation of the water, or an ownership thereof. *Id.*
 4. **IDEM.—DEMURRER, WHAT IT ADMITS.**—A demurrer admits the facts as alleged in the complaint. *Tuolumne Water Co. v. Chapman*, 392.
 5. **PLEADING—WANT OF CAPACITY TO BE SPECIALLY PLEADED.**—The want of capacity in plaintiff to sue should be specifically set up in the answer. The general issue is not sufficient. *Cal. Steam Navigation Company v. Wright*, 585.
- See **AGENCY**, 12-21; **ATTACHMENT**, 10; **BILLS AND NOTES**, 13, 15; **BURDEN OF PROOF**; **CONTRACT**, 12; **JUDGMENT**, 4-6; **LAND**, 15, 32; **MALICIOUS PROSECUTION**, 4; **MORTGAGE**, 1-6; **PARTIES**, 2, 3; **PRACTICE**, 8; **WATER RIGHT**, 16, 17.

PLEDGE.

1. **PLEDGE AND MORTGAGE, DISTINGUISHED.**—Where a lease is assigned as security for a note, it is a pledge, and not a mortgage. The "pledgee" does not take the legal title by the assignment, or by failure of the "pledgor" to pay the note; but he has the right to collect the rents, and apply them on the note, and is responsible for the surplus. *Dewey v. Bowman*, 145.
2. **IDEM.**—A pledgee has no right to sell until after demand and notice; and if he sells without demand and notice, to a party having full knowledge of his title, no absolute title passes, and the property remains in the hands of the purchaser, as a pledge. *Id.*

See **ATTACHMENT**, 9; **FRAUD**, 5; **SHIPS AND SHIPPING**, 4.

POSSESSION.

PERSONAL PROPERTY—POSSESSION EVIDENCE OF TITLE.—Possession of personal property is *prima facie* evidence of ownership. The possession of the servant is the possession of the master. *Goodwin v. Garr*, 615.

See **EJECTMENT**, 2; **FORCIBLE ENTRY AND DETAINER**, 2; **LAND**, 35-41; **MINING CLAIMS**; **WATER RIGHT**, 6, 7.

POSTHUMOUS CHILD.

See **HUSBAND AND WIFE**, 2.

PRACTICE.

1. **APPEAL—ORDERS NOT REVIEWABLE.**—This Court will not review an order denying a continuance, except where there has been an abuse of the discretion vested in them by the Court below. *Frank v. Brady*, 47.
2. **ERRORS, HOW CURED.**—A failure on the part of a plaintiff to make out his case, and error in the Court in refusing to instruct the jury as in case of nonsuit, can be cured by the testimony of the defense. *Winans v. Hard-
enburgh*, 291.

3. **APPEAL—REINSTATEMENT OF CASE.**—The Supreme Court has the power, under its rules, to reinstate cases which have been dismissed at a previous term. *Haight v. Gay*, 297.
 4. **IDEM.—MOTION FOR.**—A motion for such relief will only be entertained upon a proper showing, and after due notice to respondent. *Id.*
 5. **APPEAL—STATEMENT, WHEN TO BE FILED.**—Where a statement, to be used on appeal, is not filed within twenty days after judgment, it cannot be regarded, and the case will be determined on the judgment-roll alone. *Macomber v. Chamberlain*, 322.
 6. **SUMMONS, WHEN RETURNABLE.**—A Justice of the Peace cannot make a summons returnable in eleven days after service. *Deldesheimer v. Brown*, 339.
 7. **APPEARANCE, WHAT ERRORS NOT WAIVED BY.**—Where a defendant appears for the purpose of taking advantage of an irregular summons by a motion to dismiss, it does not amount to a waiver of his rights so as to cure the defect. *Id.*
 8. **IDEM.**—Nor does he waive his rights by answering after moving to dismiss, and motion overruled. *Id.*
- See **APPEAL**; **ATTACHMENT**; **CONTINUANCE**; **CRIMINAL LAW**; **EXECUTION**, 1; **EQUITY**, 2, 3; **EVIDENCE**, 9-13; **FINDING**, 1, 2; **INSTRUCTION**; **JUSTICES OF THE PEACE**; **MORTGAGE**, 3, 4; **PARTIES**, 1, 2; **PARTNERSHIP**, 10, 16; **NEW TRIAL**.

PRESUMPTION.

See **BILLS AND NOTES**, 1; **EVIDENCE**, 3-5; **LAND**, 24; **PARTNERSHIP**, 3; **REVENUE**, 1; **REPLEVIN**, 1-3.

PRINCIPAL.

See **AGENCY**.

PROMISSORY NOTE.

See **BILLS AND NOTES**.

PUEBLO.

See **LAND**.

RECEIVER.

See **PARTNERSHIP**, 7-13;

RECORD.

See **ATTACHMENT**, 5; **FINDINGS**, 3.

RECORDER.

See **ACKNOWLEDGMENT**, 1.

REMEDIES.

See **APPEAL**, 9; **FRAUD**, 5; **LAND**, 30, 31; **PARTNERSHIP**, 5.

REPLEVIN.

1. **REPLEVIN BOND, LIABILITY OF SURETIES ON.**—Where the plaintiff in replevin gives the statutory undertaking, and takes possession of the property in suit, and is afterwards nonsuited, and judgment entered against him for the return of the property and for costs: *Held*, that his sureties are liable for damages sustained by defendant, by reason of a failure to return the goods; but not for damages for the original taking and detention, the value of the goods not having been found by the jury. *Ginaca v. Atwood*, 448.
2. **IDEM.—STATUTE CONSTRUED.**—Section 177 of the Practice Act applies only where the issues of the case have been submitted and passed on by the jury, and not to a case of judgment of nonsuit. *Id.*
3. **IDEM.—NONSUIT, EFFECT OF.**—The facts which upon a trial by jury, would have been found in the original replevin suit, are, by a nonsuit

therein, left to the jury called in the suit on the undertaking, so far as the conditions of the undertaking will authorize an inquiry into them. *Id.*

See CREDITOR.

RESPONDEAT SUPERIOR.

See CONTRACT, 4.

REVENUE.

1. **STATUTORY CONSTRUCTION—APPROPRIATIONS FROM COUNTY FUNDS.**—The act authorizing the county recorder of Yuba county, to be paid out of the county treasury, for certain specified services, contains no words which raise the presumption that he was to be allowed a preference over other creditors. *People v. Williams*, 97.
2. **IDEM.**—Every appropriation in the contemplation of law, is to be paid in money. *Id.*
3. **IDEM.—ACCRUING REVENUE.**—Though the Legislature can make such disposition of accruing revenue as its deems proper, a construction of a statute which would impair the rights of third parties, will always be unwillingly adopted, in the absence of express words to that effect. *Id.*

SACRAMENTO.

See STATUTE, 1, 2.

SALARIES.

See OFFICE AND OFFICER, 7; SAN FRANCISCO, 2.

SALE.

1. **BILL OF SALE, HOW ALTERED.**—Parol evidence is inadmissible to show that a bill of sale included property not described therein. Where a bill of sale is defective in such particular, it can only be altered by a direct proceeding in chancery for the purpose of reforming it. *Osborn v. Hendrickson*, 31.
2. **STATUTE OF FRAUDS—POSSESSION REMAINING IN VENDOR.**—A sale of merchandise by bill of sale, the goods remaining in the possession of the vendors, as warehousemen, at a regular charge, and their receipt given for the goods on storage, the vendors doing business as commission merchants, and sometimes receiving goods on storage, is void as to the creditors of the vendors. *Stewart v. Scannell*, 80.
3. **IDEM.—CHANGE OF POSSESSION REQUISITE.**—The absence of any fraudulent intent will not take the case out of the Statute. There must be an actual and continued change of possession, or the sale is void as to creditors. *Id.*
4. **STATUTE OF FRAUDS—SALE, WHEN VALID.**—A sale of personal property, to be valid against creditors, must be accompanied by an actual and continued change of possession. *Whitney v. Stark*, 514.
5. **SALE AND DELIVERY—TITLE OF FIRST PURCHASER.**—Where the purchasers from a common vendor are equally innocent, or equally in fault, the first purchaser is entitled to the goods. *Vance v. Boynton*, 554.
6. **IDEM.—SALE, WHEN VOID.**—Whether a sale of personal property is void as to subsequent purchasers, must be determined under the fifteenth section of the Statute of Frauds. *Id.*
7. **DELIVERY, WHEN A QUESTION OF LAW.**—The question of delivery and change of possession, under the fifteenth section, is a mixed question of law and fact; but as to what shall constitute a delivery, is a question of law alone. *Id.*
8. **TRIAL—QUESTION OF INTENT.**—The question of the intention of the parties should not be submitted to the jury. *Id.*
9. **SALE OF PROPERTY IN BULK—INSUFFICIENT DELIVERY.**—Where H., the owner of barley, which he has piled up in his corral, sells five hundred sacks thereof to V., who has it separated, marked "V.," and piled up in another part of the corral, and employs a third person to take care of the same for him, and H. afterwards sells and delivers the same to B.:

- Held*, that B. was entitled to the property, the sale from H. to V. not being followed by an actual and continued change of possession. *Id.*
10. **SALE AND DELIVERY OF PROPERTY IN WAREHOUSE.**—Where the owner of a certain number of barrels of flour on storage in a warehouse sold them all to different purchasers, giving them orders on the warehouseman, which were given by the purchasers to the warehouseman, and new receipts given to them in their own names by the latter, and entries made on his books charging the vendor, and crediting the purchasers with their respective lots: *Held*, that there was a sufficient delivery of possession without a separation of the various lots. *Horr v. Barker*, 603.
 11. **IDEM.—SEGREGATION, WHEN NECESSARY.**—Where a vendor only sells a part of goods on storage, if all together and of the same mark, must be separated from the larger mass in order to change the possession; but where all the goods of the vendor in the hands of a third party are sold, the change of possession is complete by delivery of the order, taking a new receipt, and entry of the transaction on the books of the warehouseman. *Id.*
 12. **IDEM.—TITLE TO PROPERTY NOT SEGREGATED.**—The different purchasers have a right to leave the goods so by them purchased in one mass, subject to an apportionment between themselves of any loss. *Id.*
 13. **SALE AND DELIVERY BY WAREHOUSE RECEIPTS.**—A delivery of a warehouse receipt, stating that the goods named therein are deliverable on return of the receipt, is sufficient *prima facie* to pass the title. There is no substantial difference in this respect between a warehouse receipt and a bill of lading. *Horr v. Baker*, 609.
 14. **IDEM.**—When the defendants show that the person to whom, in his own name, the receipt was given, and who passed it to plaintiff, was their agent, or broker, acting for them, but permitted to keep it on storage in his own name, they do not rebut the *prima facie* case made out by the plaintiffs, by the possession of the receipt. *Id.*
- See CREDITOR; EVIDENCE, 7, 8; FRAUD, 3-5; SHERIFF'S SALE.

SAN FRANCISCO.

1. **ACCOUNTS AGAINST CITY, AUDITING AND PAYMENT OF.**—An account audited against the City of San Francisco, but not paid at the time the Consolidation Act went into effect, need not again be audited to entitle it to payment. *Knos v. Woods*, 545.
2. **IDEM.—SALARIES OF TEACHERS.**—The salaries of teachers, under the Consolidation Act, should be paid in the same manner as other claims against the treasury. *Id.*

See LAND, 9-17, 19-22, 37-39.

SCHEDULE.

See INSOLVENCY, 2.

SEGREGATION.

See LAND, 23, 24; SALE, 9-14.

SET-OFF.

See EJECTMENT, 1; LAND, 16, 32.

SHERIFF.

1. **SHERIFF—WHEN EX-SHERIFF TO EXECUTE PROCESS.**—On the election of a new sheriff, the former sheriff must complete the execution of all final process which he had begun to execute before the expiration of his term of office. *People ex rel. Dunn v. Boring*, 406.
2. **IDEM.—AUTHORITY CONSTRUED.**—The authority to sell land, conferred by a writ thus in his hands, carries with it authority to execute all the instruments required by law, to the completion of the sale, viz: a certificate, and in case of no redemption, a conveyance, to the purchaser. *Id.*
3. **IDEM.—REMEDY OF PURCHASER AT SALE.**—Where the ex-sheriff, who made the sale of land under a writ partially executed by him while in office,

dies before executing a conveyance, the law having failed to provide for the completion of the execution in such a case, the only remedy left to the purchaser, is to apply to the Court for the appointment of a commissioner or master to execute the conveyance. *Id.*

4. *IDEM.*—WHO MAY MAKE DEED.—Independent of statute, the Court, by virtue of its original jurisdiction, has authority to appoint a suitable person to make and deliver the deed, in the enforcement of its judgment, and that its final process may be completely executed. *Id.*

See ATTACHMENT, 4, 8, 12; EXECUTION, 3; STATUTE, 1, 2; TAXES, 1.

SHERIFF'S SALE.

1. EXECUTION SALE—RELIEF OF PURCHASER.—Where a party purchased real estate at an execution sale, upon the faith of the representations of the judgment creditor, that his judgment was the first on the property, when, in fact, there were prior incumbrances on it of more than its value: *Held*, that the purchaser should be relieved, and the judgment creditor should be estopped from claiming an advantage resulting from his own misrepresentations. *Webster v. Haworth*, 21.
2. *IDEM.*—It makes no difference whether the misrepresentations were made willfully or ignorantly, or that the action against the purchaser was brought in the name of the sheriff. *Id.*
3. *IDEM.*—CAVEAT EMPTOR.—Ordinarily, the maxim of *Caveat emptor* applies to judicial sales, but it has many limitations and exceptions. *Id.*
4. EXECUTION SALE—UNDER VOID JUDGMENT.—A sale under a void judgment, passes no title. If the judgment is merely voidable, the sale is good. *Gray v. Hawes*, 562.

See EXECUTION; LAND, 13, 14; SHERIFF, 1-4.

SHIPS AND SHIPPING.

1. MORTGAGE ON VESSEL, NOTICE OF.—Where A., the owner of a sea-going vessel, executes to B. a mortgage thereon, which is recorded in the custom-house of her home port, B. commences suit to foreclose the mortgage, and makes C. a party defendant thereto, on the ground that he has purchased the vessel, subject to the lien of plaintiff's mortgage; C., in his defense, avers that the mortgage was void under our Statute of Frauds, and that he now held the vessel discharged from the same: *Held*, that the mortgage was a valid lien, and that the record of the mortgage was sufficient notice thereof to C. *Mitchell v. Steelman*, 363.
2. COMMERCE—POWER OF CONGRESS, WHEN EXCLUSIVE.—The power of Congress to regulate commerce, is exclusive, when exercised. The Act of Congress of July 29th, 1850, authorizing mortgages of this kind to be recorded, and making the record thereof notice to third parties, being in conflict with our Statute of Frauds, the latter must yield. *Id.*
3. MORTGAGE—STATUTE OF FRAUDS.—Where notice of a mortgage is had by a subsequent purchaser or mortgagor, he is not protected by our Statute of Frauds. *Id.*
4. MASTER, WHEN MAY SELL OR PLEDGE VESSEL.—In order to authorize the captain of a vessel to pledge or sell the property of his owners for necessities, certain facts must be established: The vessel must be in a foreign port; the voyage must be unfinished; the pledge or sale must be indispensable to enable the ship to complete her voyage. *Marrion v. Pioche*, 522.

. See VESSELS.

STARE DECISIS.

See LAND, 18.

STATE COURT.

See INJUNCTION.

STATE LANDS.

See LAND, 20.

STATEMENT.

See FINDINGS, 4; INJUNCTION.

STATUTE.

1. **STATUTE—EFFECT OF REPEALING ACT.**—Where a general repealing Statute is passed, and on the next day a supplementary Act is passed, excepting certain counties from the operation of the repeal, to a certain extent: *Held*, that the case was a special one, and there being no doubt of the true intention of the Legislature, the supplemental Act must be regarded as a part of the repealing Act, and must be given the same effect as if passed on the same day. *Manlove v. White*, 376.
 2. **IDEM.**—So held, in the construction of the Act of April 29, 1857, repealing the then existing law concerning ex-sheriffs, as tax collectors, and requiring them to turn over the assessment rolls to their successors, taken in connection with the Act of April 30th, excepting certain counties from the operation of the repealing law of the day previous. *Id.*
 3. **CONSTITUTIONAL LAW—RETURN OF BILL BY GOVERNOR.**—The Constitution provides that if any bill presented to the Governor (having passed both houses of the Legislature) shall not be returned within ten days after it shall have been presented to him, Sundays excepted, the same shall become a law in like manner as if he had signed it, unless the Legislature, by adjournment, prevent such return. *Price v. Whitman*, 412.
 4. **CONSTITUTION—LITERAL CRITICISM.**—The decision in the *People ex rel. Hepburn v. Whitman*, was predicated upon an error in the printed copy of the Constitution, the word "Sunday" being there used in the singular. *Id.*
 5. **IDEM.—RETURN OF BILL BY GOVERNOR.**—The ten days given by the Constitution must be computed by excluding the day on which the bill is presented to the Governor. *Id.*
 6. **IDEM.—COMPUTATION OF TIME.**—Where it is necessary to give effect to contracts and carry out the intention of parties, the first day is, by the Courts, included, or excluded, as the case requires, there appearing to be no uniform rule on the subject; but when a time for deliberation is allowed, the exclusive rule should be adopted. *Id.*
- See FORCIBLE ENTRY AND DETAINER, 1; INSOLVENCY, 1; JUSTICE OF THE PEACE, 2; MORTGAGE, 6; OFFICE AND OFFICER, 7; REPLEVIN, 1; REVENUE.

STATUTE OF FRAUDS.

See CONSIGNOR AND CONSIGNEE, 1-6; JUSTICE OF THE PEACE, 3.

SUMMONS.

See AGENCY, 18, 19; JUDGMENT, 5, 9; PRACTICE, 6.

SUPERVISORS.

See CERTIORARI.

SURETY.

See ARREST AND BAIL, 1, 2; BOND, 1, 2, 3; JUDGMENT, 1, 2, 3; REPLEVIN, 1-3.

TAXES.

AGENT ESTOPPED TO DENY RIGHT OF PRINCIPAL.—Where the sheriff, as *ex officio* tax-collector, received taxes, and afterwards, on being sued therefor, denied the right of the county to recover the same from him, because the same had been illegally levied by the Court of Sessions: *Held*, that although the Court of Sessions had no power to levy taxes, yet the defendant, being the agent or trustee of the county, was estopped from denying the right of the county to recover. *Placer Co. v. Astin*, 303.

See LAND, 23, 24.

TENANT-IN-COMMON.

TENANT-IN-COMMON, POWER TO ALIENATE.—A tenant-in-common of a chattel,

cannot dispose of anything more than his own interest therein. *People v. Marshall*, 51.

See WATER RIGHT, 1.

TIME.

See STATUTE, 5.

TITLE.

See LAND.

TORT.

See PARTIES, 1, 2, 3.

TRANSCRIPT.

See APPEAL, 13.

TRESPASS.

See CRIMINAL LAW, 11, 12.

TRIAL.

See CRIMINAL LAW, 9, 10, 26, 27; EQUITY, 3; EVIDENCE, 21; HOMESTEAD, 17; SALE 7, 8.

UNDERTAKING.

See APPEAL, 1-4; BOND; REPLEVIN, 1, 2, 3.

VENDITIONI EXPOSAS.

See EXECUTION, 2.

VENDOR AND VENDEE.

See LAND, 25-36; SALE.

VENDOR'S LIEN.

See LAND, 27, 28.

VERDICT.

See AGENCY, 15; APPEAL, 15; EQUITY, 2; NEW TRIAL, 3.

VESSELS.

1. LIEN ON BOATS AND VESSELS, WHEN IT ATTACHES.—In actions against boats and vessels, under the Statute, the lien attaches only when service is had in the suit. *Fisher v. White*, 418.

2. *IDEM*.—It was not the intention of the Legislature to make the lien attach when the liability was incurred. *Id*.

See CONTRACT, 11-13; SHIP AND SHIPPING.

VETO.

See STATUTE, 3, 4, 5, 6.

WATER RIGHT.

1. ACTION FOR DIVERSION OF WATER.—Actions for the diversion of waters of ditches, are in the nature of actions for the abatement of nuisances, and may be maintained by tenants-in-common in a joint action. *Parks v. Kilham*, 77.

2. WATER RIGHTS, DILIGENCE REQUISITE.—The line upon which a ditch is actually intended to be dug, should be run within a reasonable time after the line of preliminary survey has been run, in order to make the right of the ditch-owners date back to the survey. What is a reasonable time must depend upon the circumstances of the case. *Id*.

3. *IDEM*.—ESTOPPEL.—Where a party stands by and sees a ditch-owner appropriate the water of a creek to his own use, at a great expense, and does not inform him of his claim to the waters, he and his vendees are estopped from afterwards claiming the water. *Id*.

4. NUISANCE, WHAT IS.—To turn aside a useful element from premises is as much a nuisance as to turn upon them a destructive element. *Id.*
5. *IDEM.*—DITCHES, WHEN NUISANCES.—A ditch, to carry off water right-fully flowing to a mining-claim, is as much a nuisance as a dam to flood it. *Id.*
6. WATER RIGHTS, FROM POSSESSION OF LAND.—Possession of public land gives the right to the use of water flowing through it for natural wants, but does not confer the right to divert it, and prevent its running upon the adjoining land of another who has taken the same up subsequently, but before the attempt to change the course of the water. *Crandall v. Woods*, 136.
7. LAND—RIGHTS UNDER POSSESSION OF.—Possession of public land carries with it the privileges and incidents of ownership against every one but the government, subject only to rights antecedently acquired. *Id.*
8. *IDEM.*—PRIORITY OF RIGHT.—As between two locators of public land, the rule, *qui prior est in tempore, potior est in jure*, must always apply. *Id.*
9. WATER RIGHTS, BY PRESCRIPTION.—Rights to the use of water become fixed after five years' adverse enjoyment of the same. *Id.*
10. WATER RIGHTS, EVIDENCE OF POSSESSION.—A notice of intention to appropriate the waters of a certain stream is evidence of possession, but of itself, alone, is not sufficient. Taken with other acts, it amounts to sufficient evidence. *Thompson v. Lee*, 275.
11. WATER RIGHTS—FIRST APPROPRIATOR.—The first appropriator of water for mining purposes, is entitled to have the water flow, without material interruption, in its natural channel. *Bear River and Auburn W. & M. Co. v. New York Min. Co.*, 327.
12. *IDEM.*—He is entitled to the water so undiminished in quantity as to leave sufficient to fill his canal or ditch, as it existed at the time of subsequent appropriations of the stream above him. *Id.*
13. *IDEM.*—DETERIORATION OF WATER.—But as to the deterioration in the quality of the water, by reason of being used for mining purposes, before it reaches the ditch of the prior locator, it must be deemed *damnum obsequie injuria*. *Id.*
14. *IDEM.*—Any other rule would involve an absolute prohibition of the use of all the water of a stream above any ditch supplied by it, in order to preserve the quality of a small portion taken therefrom. *Id.*
15. WATER RIGHTS—FIRST APPROPRIATOR.—The right of the first appropriator of water is equally protected from damage occasioned by subsequent locators above him, as well as below. *Hill v. King*, 336.
16. PLEADINGS—SUFFICIENCY OF COMPLAINT FOR INJUNCTION.—A complaint alleging that plaintiffs had, for a long time, conveyed water from a stream for mining purposes, by means of a ditch, and had thus acquired a prior right to the enjoyment and use of the water, and were in the peaceable possession thereof, when defendants wrongfully diverted the same, and deprived plaintiffs thereof, and were continuing so to do, is sufficient to maintain a prayer for an injunction. *Tuolumne Water Co. v. Chapman*, 392.
17. *IDEM.*—IMMATERIAL ALLEGATIONS.—The allegation in the complaint, that defendants wrongfully claim some pretended and fictitious right to the use of the water, does not prejudice the right of the plaintiffs to the injunction. *Id.*
18. NUISANCE—DIVERSION OF WATER-COURSE.—The diversion of a water-course is a private nuisance. *Id.*
19. *IDEM.*—EQUITABLE RELIEF.—No equitable remedy can be had for a mere past diversion of a water-course; but when the injury is continuing, relief may appropriately be sought in equity. *Id.*
20. INJUNCTION, WHEN ALLOWED.—There is no occasion that the plaintiff should first establish his title at law, before he can obtain the injunction, when the averment of his right in the complaint is admitted by demurrer. *Id.*
21. WATER RIGHTS—FIRST APPROPRIATOR.—Where the defendants had constructed a ditch for mining purposes, and the plaintiffs had subsequently constructed another, taking its water from the same stream, and brought

suit for damages sustained by reason of an enlargement of defendant's ditch, made after the commencement of plaintiffs' ditch, causing a diversion of a greater quantity of water; and praying for an injunction: *Held*, that defendants are not limited to the quantity of water turned into their ditch in the first instance, unless by the general plan, size, and grade, of the ditch, it was not capable of carrying more water than was then diverted. *White v. Todd's Val. Water Co.*, 443.

22. *Idem.*—**TIME FOR CONSTRUCTION OF DITCH.**—If, by reason of obstructions in the ditch, or irregularity in the grade at the time, it was not capable of diverting as much water as its general size would indicate, the defendants would have a reasonable time to adjust the grade and remove such obstructions, and then fill the ditch to its capacity. *Id.*
23. *Idem.*—But if they continued to divert only the original quantity of water long enough to indicate that they only intended to divert that amount, or failed for an unreasonable length of time to remove the obstructions or adjust the grade, they would be limited to the amount thus diverted, and plaintiffs would be entitled to the residue. *Id.*

See PLEADING, 2, 3.

WILL.

See HUSBAND AND WIFE, 1, 2.

WITNESS.

See CRIMINAL LAW, 26, 27, 31; EVIDENCE, 6-13.

WRIT.

See APPEAL, 10; ATTACHMENT; EXECUTION; INJUNCTION.

WRIT OF ERROR.

See APPEAL, 10.

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